DOCKET

No. 08-192
Title: Salman Khade Abuelhawa, Petitioner
v.
United States
Docketed: August 14, 2008
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (07-4639)
Decision Date: April 25, 2008
Rehearing Denied: May 23, 2008
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 13 2008	Petition for a writ of certiorari filed. (Response due September 15, 2008)
Sep 10 2008	Order extending time to file response to petition to and including October 15, 2008.
Sep 15 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 15 2008	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Oct 15 2008	Brief of respondent United States in opposition filed.
Oct 28 2008	Reply of petitioner Salman Khade Abuelhawa filed. (Distributed)
Oct 29 2008	DISTRIBUTED for Conference of November 14, 2008.
Nov 14 2008	Petition GRANTED.
Dec 8 2008	SET FOR ARGUMENT ON Wednesday, March 4, 2009.
Dec 19 2008	Record received from the U.S.C.A. for the 4th Circuit. (1 envelope)
Dec 23 2008	Record received from the U.S.D.C. for the Eastern District of Virginia. (1 box). There are sealed documents in this record.
Dec 23 2008	Motion to dispense with printing the joint appendix filed by petitioner Salman Khade Abuelhawa.
Dec 29 2008	Brief of petitioner Salman Khade Abuelhawa filed.
Jan 5 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jan 5 2009	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Jan 9 2009	CIRCULATED.
Jan 12 2009	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 28 2009	Brief of respondent United States filed. (Distributed).
Feb 25 2009	Reply of petitioner Salman Khade Abuelhawa filed. (Distributed)
Mar 4 2009	Argued. For petitioner: Sri Srinivasan, Washington, D.C. For respondent: Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

08-192 AUG 13 2008

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No. 08-___

IN THE
Supreme Court of the United States

SALMAN KHADE ABUELHAWA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the use of a telephone to buy drugs for personal use "facilitates" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 523 F.3d 415 (4th Cir. 2008). The order denying a petition for rehearing en banc (App. C) is unreported. The decisions of the district court (App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008. App., *infra*, 1a. A petition for rehearing en banc was denied on May 23, 2008. *Id.* at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 843 of Title 21 of the United States Code provides in pertinent part as follows:

> (b) ***Communication facility***.
>
> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in

the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * * * *

(d) ***Penalties.***

(1) Except as provided in paragraph (2) [which provides for greater penalties in cases involving manufacture of methamphetamine], any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine under title 18, United States Code, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine under title 18, United States Code, or both.

STATEMENT OF THE CASE

The court of appeals' decision in this case deepens an acknowledged conflict among the circuits concerning the proper interpretation of 21 U.S.C. § 843(b). Section 843(b) makes it unlawful to use a communications facility to "facilitat[e] the commission of any act or acts constituting a felony" under the federal drug laws. 21 U.S.C. § 843(b). Petitioner Salman

Khade Abuelhawa used a cellular phone to arrange the purchase of a small amount of drugs for his own personal use, and was convicted of using a phone to facilitate the commission of a drug "felony" in violation of Section 843(b). The Fourth Circuit affirmed, reasoning that the crime facilitated by petitioner's use of his cellular phone was not the purchase of drugs for personal use (a misdemeanor), but was the *seller*'s distribution of the drugs (a felony).

Three courts of appeals hold that Section 843(b) does not reach the use of a telephone to purchase drugs for personal use, while two courts of appeals—including the court of appeals in this case—have now reached the opposite conclusion. The interpretation of Section 843(b) adopted by the court of appeals in this case cannot be squared with the terms of the provision or with its statutory context and history. And because the court of appeals' approach would transform any misdemeanor purchase of drugs for personal use into a felony whenever—as is routine—a cellular phone or other communications device is used in the transaction, the decision has profound implications for the proper administration of the federal drug laws. This Court's review is warranted.

1. In June 2003, as part of an investigation into drug distribution by Mohammed Said, the government obtained authorization to wiretap Said's cell phone. On July 5 and 12, 2003, the wiretap recorded several cellular phone calls between Said and petitioner. At trial, the government presented evidence that Said and petitioner had discussed, in code, petitioner's purchase of small amounts of cocaine for his personal use. Petitioner was arrested on October 17, 2003. He admitted to the arresting agents that he had purchased small amounts of cocaine from Said

in the past, but he made no statements indicating that he had purchased cocaine on July 5 or 12, 2003. The government, moreover, never recovered any drugs from the transactions alleged to have taken place on those days. *See* App., *infra*, 2a-6a.

Petitioner was charged with violating 21 U.S.C. § 843(b) in connection with the July 5 and 12, 2003, cell phone calls. App., *infra*, 6a-7a.[1] Section 843(b) makes it "unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of" the federal drug laws. The government made no claim—and introduced no evidence—suggesting that petitioner was a drug dealer or anything more than a user. The government therefore did not dispute that petitioner's purchase of cocaine was solely for his own personal use and thus constituted only the misdemeanor of simple possession. *See* 21 U.S.C. § 844(a). The government nonetheless took the position that petitioner had facilitated a drug "felony" under Section 843(b) on the theory that his use of a cellular phone to buy drugs from Said had facilitated *Said*'s sale of drugs to petitioner. *See* App., *infra*, 26a; C.A. App. 21-23, 106. Throughout the proceedings, the sole drug felony alleged by the government to have been facilitated by petitioner's use of a cellular phone is *Said*'s drug distribution.

Petitioner moved for a judgment of acquittal at the close of the government's case, *see* App., *infra*,

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[1] Petitioner was also charged with violating Section 843(b) in connection with a phone call made on June 29, 2003, but that count was dismissed before trial. App., *infra*, 7a.

7a, arguing that he had facilitated only the misdemeanor crime of purchasing drugs for personal use and therefore could not be guilty of facilitating a drug "felony" in violation of Section 843(b). *Id.* at 20a-25a; *see also* C.A. App. 80-85. The district court denied the motion. The court considered Section 843(b) to "apply to a situation like this, because but for the phone conversation, this particular distribution would not have occurred. So it facilitated [the distribution]." App, *infra*, 21a. The court acknowledged that "several circuits have found that that's not an appropriate reading of the statute," *id.* at 21a-22a, and that "it may not make sense to ratchet up what would probably be a simple possession case to a felony," *id.* at 21a. The court further observed that "a misdemeanor might have been a more appropriate charge" against petitioner but that the "government for whatever reasons chose to proceed this way." *Id.* at 24a. The court explained, however, that it ultimately "doesn't get involved" with "charging decisions," *id.*, and it believed that the language of Section 843(b) encompasses this case, *id.* at 23a-24a.

The jury found petitioner guilty of violating Section 843(b). Petitioner, who had renewed his motion for a judgment of acquittal at the close of all the evidence, C.A. App. 213, again moved for a judgment of acquittal after the jury's verdict, *id.* at 274-79. The district court again denied the motion, but acknowledged once more that "there's a split among the circuits" on the issue. App., *infra*, 33a. The court also stated that petitioner has "a legitimate legal argument which down the road [he] may be successful with that the conduct involved in this case does not amount to a violation of [Section] 843." *Id.* at 35a. The court sentenced petitioner to 24 months of pro-

bation and ordered him to pay a $2,000 fine. *Id.* at 7a-8a.[2]

2. The court of appeals affirmed. App., *infra*, 1a-18a. The court acknowledged at the outset that petitioner had obtained drugs solely "for his personal use." *Id.* at 9a. The court rejected petitioner's contention that the use of a communications device to purchase drugs for personal use falls outside the scope of Section 843(b). *Id.* at 8a-13a.

The court "beg[a]n with the recognition that [its] sister circuits are divided on the issue." App., *infra*, 9a. Some circuits, the court explained, "find that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated." *Id.* at 9a-10a (citing *United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1989); *United States v. Martin*, 599 F.2d 880, 888-89 (9th Cir. 1979), *overruled on other grounds*, *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984)). "In contrast," the court of appeals explained, "other circuits have concluded that distributions for personal use are covered by § 843(b)." *Id.* at 10a (citing, *inter alia*, *United States v. Binkley*, 903 F.2d 1130, 1135-36 (7th Cir. 1990)). Now "[f]aced directly with the issue confronted in those cases," the court of appeals concluded that the latter view constitutes "the better of the argument as to whether § 843(b) applies to facilitation of a drug distribution for personal use." *Id.* at 11a.

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[2] The court merged petitioners' counts of conviction such that petitioner ultimately was convicted of one count of violating Section 843(b) in connection with the July 5, 2003, cell phone calls, and another count in connection with the July 12, 2003, calls. *See* App., *infra*, 8a n.4, 34a-35a.

The court reasoned that, while Section 843(b) requires the use of a communications device to facilitate a drug felony, the "statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated." App., *infra*, 11a. Here, the court believed, petitioner's "use of a cell phone undoubtedly made *Said's* cocaine distribution easier; in fact, 'it made the sale possible.'" *Id.* (quoting *Binkley*, 903 F.2d at 1136). In the court's view, therefore, the "fact that [petitioner's] possession of cocaine for personal use may not itself be a felony is simply irrelevant under § 843(b)." *Id.* at 11a-12a (citation omitted). The court agreed with the Seventh Circuit that a defendant who, "by [his] use of the telephone," makes "the distribution of . . . cocaine easier" has "facilitated it and violated the statute." *Id.* at 12a (quoting *United States v. Kozinski*, 16 F.3d 795, 807 (7th Cir. 1994)). "What [he does] with the cocaine after it is distributed is irrelevant to whether [he] facilitated the distribution." *Id.* (quoting *Kozinski*, 16 F.3d at 807). The court accordingly held that "persons like [petitioner], who facilitate distribution of a controlled substance to themselves for personal use by using a communication facility, can be prosecuted for violating § 843(b)." *Id.* at 13a.[3]

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[3] The court of appeals also rejected petitioner's contention that the evidence was insufficient to show that the alleged drug sales that formed the basis of the Section 843(b) convictions had in fact taken place. App., *infra*, 13a-18a. While petitioner does not renew that claim in this Court, the insubstantiality of the evidence of completed sales only bolsters the case for granting review of petitioner's convictions. The government recovered no drugs and admitted no drugs into evidence, it presented no witness who saw any drugs or any part of the alleged transactions, and it introduced no statements affirmatively indicating that the transactions had taken place.

REASONS FOR GRANTING THE WRIT

There is an acknowledged conflict among the courts of appeals on whether Section 843(b) applies to the purchase of drugs for personal use, with three courts of appeals concluding that Section 843(b) fails to encompass that situation and two courts of appeals reaching the opposite conclusion. The issue also has far-reaching consequences for the administration of the federal drug laws, and this case squarely raises the issue and presents a highly suitable vehicle for resolving it. In addition, the court of appeals' decision cannot be squared with Section 843(b)'s terms or with the statutory context and history. This Court therefore should grant review.

A. There Is An Acknowledged Conflict Among The Courts Of Appeals On Whether Section 843(b) Applies To The Purchase Of Drugs For Personal Use

1. The court of appeals recognized that the "circuits are divided" on whether Section 843(b) bars the use of a communications device to facilitate a purchase of drugs for personal use. App., *infra*, 9a. In concluding that Section 843(b) applies in that situation, the court of appeals reasoned that the "statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated." *Id.* at 11a. In the court's view, petitioner facilitated not only his own misdemeanor purchase of drugs, but also the seller's felony sale of the drugs. *Id.* The court therefore considered it "simply irrelevant" that petitioner's "possession of cocaine for personal use may not itself be a felony." *Id.* at 11a-12a.

The court of appeals' interpretation of Section 843(b) is consistent with that of the Seventh Circuit.

App., *infra*, 13a. Indeed, the Fourth Circuit below quoted extensively from the Seventh Circuit's decisions and echoed that court's reasoning. *See id.* at 12a-13a. In particular, in *United States v. Binkley*, 903 F.2d 1130 (7th Cir. 1990), the Seventh Circuit held that the use of a telephone to purchase drugs for personal use violates Section 843(b). In the court's view, "it is not necessary to determine what a defendant does with the cocaine he purchased in order to determine whether that defendant violated § 843(b)." *Id.* at 1135-36. That is because, "regardless of what [the defendant] did with the cocaine after the sale"—*i.e.*, regardless of whether he personally used the drugs or distributed them—his telephone conversations with the seller "not only made [the seller's] sale of cocaine (a felony . . .) easier, it made the sale possible." *Id.* at 1136. The Seventh Circuit concluded that the buyer's "subsequent treatment of the cocaine cannot retroactively diminish [his] previous facilitation of [the seller's] cocaine sale." *Id.*[4]

The Seventh Circuit has since "reaffirmed [its] holding in *Binkley*." *United States v. Kozinski*, 16 F.3d 795, 807 (7th Cir. 2004). In *Kozinski*, the Seventh Circuit rejected the defendants' argument that they could not violate Section 843(b) "if they were using the telephone to purchase cocaine for their

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[4] Judge Cudahy dissented. *Binkley*, 903 F.2d at 1137-39. He observed that the majority's rationale conflicted with the long settled rule that a purchaser of drugs for personal use cannot be convicted of aiding and abetting the sale of drugs to himself. *Id.* at 1138. Judge Cudahy also explained that the majority's theory "makes no sense" because, under that theory, "actual possession of one gram of cocaine would be a misdemeanor," whereas "use of the telephone to obtain the cocaine would be a felony." *Id.*

own use." *Id.* The court noted that "[d]istributing cocaine is [a] felony," and reasoned that if, "by their use of the telephone, the [defendants] have made the distribution of the cocaine easier, they have facilitated it and violated the statute." *Id.* The court believed that "a person who uses a telephone to assist the distribution of cocaine, and then consumes the cocaine is as culpable as the one who uses the telephone to assist the distribution, and then gives the cocaine to another to consume." *Id.*

2. The Seventh Circuit, like the Fourth Circuit below, explicitly acknowledges that its interpretation of Section 843(b) conflicts with the decisions of other courts of appeals. *See Binkley*, 903 F.2d at 1135. To begin with, in *United States v. Martin*, 599 F.2d 880 (9th Cir. 1979), the Ninth Circuit reversed the conviction of a defendant who had been found guilty of violating Section 843(b) based on his purchase of a small amount of cocaine for personal use. The Ninth Circuit rejected the government's argument that the defendant had facilitated a conspiracy to distribute drugs, and instead accepted the defendants' argument that "a buyer cannot facilitate the very sale which creates his status." *Id.* at 888. The court determined that none of its decisions supported the "position that the distribution of drugs or an agreement to distribute drugs is 'facilitated' by a purchaser of the drugs." *Id.* Rather, in each of its decisions upholding "a conviction for facilitation, the defendant's role in the distribution of the drugs has been far more substantial than that of a buyer for personal consumption." *Id.*

The Ninth Circuit explained that its holding was consistent with Congress's intention in the federal drug laws "to draw a sharp distinction between dis-

tributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *Martin*, 599 F.2d at 889. "To hold that persons who merely buy drugs for their personal use are on an equal footing with distributors by virtue of the facilitation statute would undermine this statutory distinction." *Id.* The Ninth Circuit has subsequently reiterated that "the use of a telephone to order cocaine for personal use . . . is no offense at all," because while "[s]ection 843(b) condemns the use of a telephone in facilitating the commission of certain felonies," the "[p]ossession of cocaine for personal use is only a misdemeanor." *United States v. Brown*, 761 F.2d 1272, 1278 (9th Cir. 1985).

The Tenth Circuit, explicitly relying on the Ninth Circuit's decisions in *Martin* and *Brown*, has likewise held that the use of a telephone to purchase drugs for personal use does not violate Section 843(b). *United States v. Baggett*, 890 F.2d 1095, 1097-98 (10th Cir. 1989). The Tenth Circuit in *Baggett* rejected the government's argument that "one who uses a telephone to facilitate their simple possession of a controlled substance transforms the crime into a felony." *Id.* at 1097. The court instead concluded that the statute "clearly places mere 'customers' in the misdemeanor category." *Id.* And "because [the defendant] used the telephone only to order drugs for personal use, a misdemeanor," the court held, "she cannot be convicted under section 843(b)." *Id.* at 1098. The Tenth Circuit has subsequently reiterated *Baggett*'s holding "that § 843(b) is not violated when the drug distribution facilitated with the use of a telephone is solely for the purpose of personal consumption." *United States v. Small*, 423 F.3d 1164, 1186 (10th Cir. 2005); *see id.* ("Be-

cause the simple possession at issue in *Baggett* was only a misdemeanor, it could not be said that the defendant's use of a telephone in that case facilitated a felony.").

Finally, the Sixth Circuit, in *United States v. Van Buren*, 804 F.2d 888 (6th Cir. 1986) (per curiam), relied on the Ninth Circuit's decision in *Martin* in holding that "evidence of the purchase of cocaine for personal use does not establish use of the telephone to further [a drug distribution] conspiracy." *Id.* at 892. The court therefore vacated the defendant's plea of guilty under Section 843(b). While *Van Buren* involved a charge that the defendant used a telephone to facilitate a conspiracy to distribute cocaine, rather than to facilitate the distribution of cocaine itself, there is no basis for distinguishing between the two when assessing the applicability of Section 843(b). *See Martin*, 599 F.2d at 888 (rejecting the "government's position that the distribution of drugs *or an agreement* to distribute drugs is 'facilitated' by a purchaser of the drugs") (emphasis added). In *Baggett*, accordingly, the Tenth Circuit relied on and expressly "agree[d] with" the Sixth Circuit's decision in *Van Buren*, even though *Baggett* involved allegations that the defendant had used a telephone to facilitate the distribution of heroin rather than to facilitate a conspiracy to distribute heroin. *Baggett*, 890 F.2d at 1097-98.[5]

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[5] The court of appeals below mistakenly believed that the Sixth Circuit had held in its pre-*Van Buren* decision in *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984), that the use of a communications device to purchase drugs for personal use violates Section 843(b). *See* App., *infra*, at 10a, 11a. In *McLernon*, the Sixth Circuit held that Section 843(b) applied to a drug *dealer* who had used a telephone to facilitate the purchase

3. The courts of appeals thus acknowledge their longstanding disagreement on the scope of Section 843(b), and courts on both sides of the conflict have reaffirmed their respective positions. In addition, the five courts of appeals to have addressed the issue account for roughly half of all federal drug prosecutions. *See* Administrative Office of the U.S. Courts, 2007 Annual Report of the Director, Judicial Business of the U.S. Courts tbl. D-3 (2007). There is no justification for prolonging the resulting disparity in treatment under the federal drug laws depending solely on where a defendant happens to reside—with defendants who use a phone to purchase a small quantity of drugs for personal use treated as misdemeanants in three circuits, and identically situated defendants treated as felons in two other circuits. This Court should grant review to resolve the disagreement and eliminate that disparity.

B. Determining The Proper Reach Of Section 843(b) Is Highly Significant To The Administration Of The Federal Drug Laws, And This Case Presents An Ideal Vehicle For Resolving The Issue

1. a. The court of appeals' interpretation of Section 843(b) dramatically expands the reach of the provision and substantially affects the administration of the federal drug laws. The purchase of drugs for personal use is a misdemeanor. *See* 21 U.S.C. § 844(a). Under the court of appeals' (and the Seventh Circuit's) understanding of Section 843(b), how-

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of 10 kilograms of cocaine for further *distribution*. 746 F.2d at 1106-07. The Sixth Circuit therefore had no occasion in that case to address the applicability of Section 843(b) to the purchase of drugs for personal use.

ever, any misdemeanor purchase of drugs for personal use may be prosecuted as a felony whenever a phone or other communications device is used in the purchase. And because "the use of a telephone by those engaged in narcotics transactions is very common," *United States v. Dotson*, 871 F.2d 1318, 1326 (6th Cir. 1989) (Guy, J., concurring), *amended on other grounds by* 895 F.2d 263 (6th Cir. 1990), the court of appeals' approach would enable the government routinely to transform misdemeanor purchases of drugs into felonies. *See United States v. de la Paz*, 43 F. Supp. 2d 370, 376 (S.D.N.Y. 1999) (observing that a "cellular telephone" is "a common tool of the drug trade").

The implications of the court of appeals' approach are particularly far-reaching because both the person who initiates a telephone call and the person who answers it "use" a telephone. Consequently, the purchaser of a small quantity of drugs for personal use could be charged with a felony if he *received* a call offering the drugs, even if he did not initiate any call seeking drugs. Indeed, the government could itself convert the purchaser's misdemeanor into a felony by placing an undercover call offering the sale. *See, e.g., United States v. McLernon*, 746 F.2d 1098, 1107 (6th Cir. 1984) ("A violation of § 843(b) may be found . . . even when the defendant does not initiate the calls."); *United States v. Cordero*, 668 F.2d 32, 43 n.16 (1st Cir. 1981) ("We are aware of no authority which suggests the term 'use' in the statute refers solely to 'placing' calls and leaves unpunished use of the telephone by the receiver of a call.").

The district court below understood that, "in a case like this, it may not make sense to ratchet up what could probably be a simple possession case to a

felony," and that "a misdemeanor might have been a more appropriate charge" against petitioner. App, *infra*, 21a, 24a. But the court felt compelled to sustain the "prosecution decision that the U.S. Attorney's Office has made" based on its reading of Section 843(b), which the court of appeals later endorsed. *Id.* The court of appeals' interpretation of Section 843(b) not only allows the government to bring a felony prosecution against the buyer of a personal-use quantity of drugs whenever the buyer uses a telephone, *see, e.g., United States v. Lewis*, 387 F. Supp. 2d 573, 575 (E.D. Va. 2005), but the court's interpretation is of substantial practical significance in another respect as well: it allows the government to use the prospect of a felony charge in such circumstances as a powerful tool in plea negotiations in an effort to induce a defendant to plead guilty to a lesser charge such as simple possession. There is no warrant for enabling the government to use the prospect of a felony charge to gain leverage in plea negotiations when the charging theory is deficient as a matter of law, as is the case here.

b. The prospect of a felony charge and conviction under Section 843(b) is of serious consequence to a defendant. First, while the purchase of a personal-use quantity of drugs is a misdemeanor carrying a maximum sentence of one year of imprisonment, 21 U.S.C. § 844(a), a felony conviction under Section 843(b) carries a sentence of up to four years of imprisonment, 21 U.S.C. § 843(d). Moreover, whereas misdemeanor drug possession does not constitute a predicate crime for purposes of certain recidivism-based sentencing enhancements, a felony conviction under Section 843(b) is a predicate crime for those purposes. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (increas-

ing sentence for offense committed "after a prior conviction for a felony drug offense has become final"). And because Section 843(b) renders "each separate use of a communication facility . . . a separate offense," a one-time buyer of a small quantity of drugs could conceivably face multiple felony convictions if several "separate" telephone conversations facilitated the purchase. 21 U.S.C. § 843(b).

A felony drug conviction under Section 843(b) also is of substantial significance to a permanent resident alien like petitioner. *See* C.A. App. 328. That is because a conviction under Section 843(b) constitutes an aggravated felony for purposes of the immigration laws, rendering the alien subject to removal from the country and ineligible for discretionary cancellation of removal. *See Lopez v. Gonzales*, 127 S. Ct. 625, 627-28; 8 U.S.C. §§ 1101(a)(43)(B) (defining "aggravated felony"), 1227(a)(2)(A)(iii) (subject to removal), 1229b(a)(3) (ineligibility for cancellation of removal).[6]

2. This case presents a highly suitable vehicle for resolving whether Section 843(b) extends to the use of a communications facility to purchase drugs for personal use. Throughout the proceedings, petitioner has preserved the claim that Section 843(b) fails to reach his purchase of drugs for personal use. *See* App., *infra*, 20a-25a, 33a-34a; Pet. C.A. Br. 8-14; C.A. App. 274-79. This case squarely raises the issue, moreover, because it is undisputed that petitioner purchased drugs solely for his own personal

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[6] Conviction of a drug felony also can render a defendant ineligible, *inter alia*, to: receive various federal benefits, *see* 21 U.S.C. § 862a(a); vote in elections, *see Richardson v. Ramirez*, 418 U.S. 24 (1974); serve on a federal jury, *see* 28 U.S.C. § 1865(b)(5); and enlist in the armed forces, *see* 10 U.S.C. § 504.

use rather than for distribution. The court of appeals accordingly explained that it was "[f]aced directly with the issue" of "whether § 843(b) applies to facilitation of a drug distribution for personal use." App., *infra*, 11a. The court also framed its holding in terms of personal use, "concluding that persons like [petitioner] who facilitate distribution of a controlled substance to themselves for personal use by using a communication facility, can be prosecuted for violating § 843(b)." *Id.* at 13a.

Because petitioner purchased drugs only for his own personal use, a misdemeanor, the government at no point has argued or suggested that petitioner used a cell phone to facilitate his own commission of a drug "felony" for purposes of Section 843(b). Rather, the sole prosecution theory advanced by the government and put to the jury was that petitioner facilitated *Said*'s commission of a drug felony—*viz.*, the distribution of drugs to petitioner. *See* Gov't C.A. Br. 16-29; App., *infra*, 26a (government stating in closing argument that element of facilitation concerns whether petitioner's use of a cell phone was "intended to facilitate . . . the distribution of cocaine by Mohammed Said to the defendant"); *id.* at 30a (jury instruction requiring jurors to determine whether petitioner used his telephone "to facilitate the commission of a drug offense, in this case, the cocaine distribution" by Said). The court of appeals thus applied Section 843(b) to petitioner on the explicit understanding that his conduct would otherwise constitute a misdemeanor, declaring "simply irrelevant" the "fact that [petitioner's] possession of cocaine for personal use may not itself be a felony." App., *infra*, 11a-12a.

C. The Court Of Appeals Erred In Interpreting Section 843(b) To Reach The Purchase Of Drugs For Personal Use

The Court should grant certiorari because the court of appeals erred in applying Section 843(b) to petitioner's purchase of drugs for personal use. The terms of the provision make it unlawful to use a telephone or other communications device to "facilitate" the commission of a drug "felony." 21 U.S.C. § 843(b). For several reasons, a person who uses a telephone to purchase drugs for personal use does not "facilitate" a drug "felony."

1. a. The term "facilitate" in Section 843(b) must be interpreted against the backdrop of the firmly established rule that a person who buys a product whose sale is unlawful is not guilty of aiding or abetting the sale. It has long been settled that "a purchaser is not a party to the crime of illegal sale." 2 Wayne R. LaFave, Substantive Criminal Law § 13.3(e), at 371 (2d ed. 2003); *see Gebardi v. United States*, 287 U.S. 112, 119 (1932) (purchaser of liquor does not aid or abet the illegal sale); *United States v. Farrar*, 281 U.S. 624, 633-34 (1930) (same). That rule reflects the general understanding that "a person is not an accomplice in an offense committed by another person if . . . the offense is so defined that his conduct is inevitably incident to its commission." Model Penal Code § 2.06(6). Under those principles, a buyer of drugs cannot be convicted of aiding and abetting his dealer's sale of the drugs to him. *See United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977) ("reject[ing] government's suggestion" that principal "who receives the drug for personal use" is "liable as an aider and abettor of the agent's distribution to him," because "under such a theory every

drug abuser would be liable for aiding and abetting the distribution which led to his possession").

The term "aid and abet" is synonymous with the term "facilitate" in Section 843(b). Indeed, Black's Law Dictionary defines "aid and abet" as "to facilitate the commission of a crime." Black's Law Dictionary 76 (8th ed. 2004). Consequently, if a purchaser of drugs cannot be convicted of aiding and abetting the sale of the drugs to himself for purposes of establishing his guilt as an accomplice, the purchaser also cannot be guilty of "facilitating" the sale of the drugs to himself for purposes of establishing his guilt under Section 843(b). *See Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting).[7]

b. The court of appeals' interpretation of the term "facilitate" in Section 843(b) also stands at odds with this Court's understanding of the same term in an analogous statute in *Rewis v. United States*, 401 U.S. 808 (1971). In *Rewis*, the Court considered whether the customers of an illegal gambling enterprise "facilitate" that enterprise within the meaning of the Travel Act, 18 U.S.C. § 1952. The court of appeals had held that the patrons of an illegal gambling establishment were not guilty of "facilitating" the establishment, and this Court agreed with that holding. *Rewis*, 401 U.S. at 811. The Court explained that "the ordinary meaning of this language

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[7] The United States Sentencing Guidelines provisions governing Section 843(b) reinforce that the term "facilitate" in that provision should be read consistently with principles governing aider-and-abettor liability. Just as the base offense level for aiding or abetting an offense is the offense level for the underlying offense, *see* U.S.S.G. § 2X2.1 (2007), the base offense level for using a telephone to facilitate a drug felony is "the offense level applicable to the underlying offense," *see id.* § 2D1.6.

suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." *Id.*

When "Congress uses the same language in two statutes having similar purposes," as with the term "facilitate" in the Travel Act and Section 843(b), "it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). Consequently, just as the customers in *Rewis* did not "facilitate" an illegal gambling establishment within the meaning of the Travel Act, a customer of drugs does not "facilitate" his dealer's drug distribution within the meaning of Section 843(b). *See Martin*, 599 F.2d at 888-89 ("A difference in the nature of the illicit business should not change the basic principle enunciated by the Supreme Court [in *Rewis*] that a mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress.").

c. The court of appeals' interpretation of "facilitate" also cannot be squared with Congress's use of that term in other drug laws. As part of the Narcotics Control Act of 1956, which first created the communication facility offense, Congress imposed felony criminal penalties on any person who "receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any [imported] narcotic drug." Pub. L. No. 84-728, § 105, 70 Stat. 567, 570 (codified at former 21 U.S.C. § 174(c) (repealed)). That provision expressly differentiated between "buy[ing]" drugs and "facilitat[ing] the . . . sale" of drugs. If, as the court of appeals reasoned, every purchase of drugs necessarily "facilitates" a corresponding sale by "ma[king] the sale possible,"

App., *infra*, 11a (internal quotation marks omitted), then the term "buys" in the Narcotics Control Act was mere surplusage. As this Court has explained, however, "[j]udges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994).

2. The court of appeals' interpretation of Section 843(b) disregards the fundamental distinction in the federal drug laws between drug distribution and drug possession for personal use. "Congress intended to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *Martin*, 599 F.2d at 889; *see Swiderski*, 548 F.2d at 499-50. In particular, Congress aimed to impose "severe penalties for commercial trafficking in and distribution of narcotics," but to emphasize "rehabilitation rather than retribution in the case of personal drug use." *Id.* at 499; *see* H.R. Rep. No. 1444, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4575. Accordingly, distribution is almost always a felony, with progressively steeper penalties depending on the schedule and quantity of drugs distributed, *see* 21 U.S.C. § 841, while possession for personal use is a misdemeanor, 21 U.S.C. § 844(a). Indeed, a person found guilty of misdemeanor possession for personal use may be allowed to avoid any judgment of conviction at all upon successful completion of a probationary period. *See* 18 U.S.C. § 3607.

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the

overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). But by interpreting Section 843(b) such that it would routinely transform misdemeanor possession of drugs for personal use into a felony, the court of appeals' approach would undermine the sharp distinction in the federal drug laws between misdemeanor possession for personal use and felony distribution. *See Martin*, 599 F.2d at 889 ("To hold that persons who merely buy drugs for their personal use are on equal footing with distributors by virtue of the facilitation statute would undermine this statutory distinction."). Under that interpretation of Section 843(b), "actual possession of one gram of cocaine would be a misdemeanor, though use of the telephone to obtain the cocaine would be a felony. This makes no sense." *Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting).

This case manifests the discord between the court of appeals' interpretation of Section 843(b) and the basic objectives of the federal drugs laws. There is no suggestion that petitioner ever took part in the distribution of drugs or was anything more than a drug user. Congress in that situation sought to emphasize rehabilitation rather than retribution, *see Swidersky*, 548 F.2d at 499-50; and petitioner has passed every drug test administered to him after his indictment. C.A. App. 331, 360, 362. Yet the court of appeals' understanding of Section 843(b) upholds felony convictions against him and exposes him to the prospect of removal from the country and ineligibility for relief from removal that would enable him to remain here with his wife and children. That result is inconsistent with Congress's fundamental objectives in the federal drug laws.

3. The court of appeals' interpretation of Section 843(b) also cannot be squared with Congress's restriction of the provision's reach to facilitation of a drug "felony." 21 U.S.C. § 843(b). Congress elected to refrain from extending Section 843(b) to reach the use of a telephone to facilitate a drug "misdemeanor." When a person uses a telephone to arrange his purchase of drugs for personal use, he facilitates the misdemeanor of possessing drugs for personal use—*i.e.*, conduct Congress elected to exclude from Section 843(b). Under the court of appeals' approach, however, any person who facilitates his own misdemeanor purchase of drugs would also facilitate the seller's felony distribution of drugs, thereby undercutting Congress's exclusion of drug misdemeanors from Section 843(b).

Section 843(b)'s statutory history is instructive on this score. The predecessor provision to Section 843(b) was not confined to facilitation of a drug "felony," but instead encompassed use of a communication facility to facilitate "any act or acts constituting an *offense*" punishable under the drug laws. Narcotics Control Act § 201, 70 Stat. at 573 (emphasis added) (codified at former 18 U.S.C. § 1403 (repealed)). Because the federal drug laws at that time treated both drug distribution and the purchase of drugs for personal use as felonies, all drug "offense[s]" covered by the original communication facility provision were felonies. *See id.* §§ 103, 105-08, 70 Stat. at 568-72 (codified at former 21 U.S.C. §§ 174, 184a (repealed); 26 U.S.C. § 7237 (repealed)).

When Congress comprehensively revised the federal drug laws in the Controlled Substances Act of 1970 (CSA), it drew a sharp distinction between drug distribution and drug use, reducing the penalty

for possession of drugs for personal use by creating a new misdemeanor offense of simple possession. Pub. L. No. 91-513, Tit. II, § 404(a) 84 Stat. 1236, 1264 (codified at 12 U.S.C. § 844(a)). That change—*viz.*, rendering "the illegal possession of a controlled drug for one's own use . . . a misdemeanor" rather than a felony—was considered "[o]ne of the most striking features of the new penalty structure" established by the CSA. 116 Cong. Rec. H33316 (daily ed. Sept. 23, 1970) (statement of Rep. Boland); *see also* H.R. Rep. No. 1444, *supra*, 1970 U.S.C.C.A.N. at 4577 (under the CSA, illegal possession "by an individual for his own use is a misdemeanor").

In the immediately preceding section of the CSA, Congress narrowed the communication facility provision to reach the facilitation only of a drug "felony," rather than a drug "offense." CSA § 403(b), 84 Stat. at 1263 (codified at 21 U.S.C. § 843(b)). Congress thus simultaneously downgraded simple possession to a misdemeanor and decriminalized the facilitation of drug misdemeanors altogether. Congress's evident purpose was to exclude from Section 843(b)'s reach the use of a communication device to facilitate the newly created misdemeanor offense of simple possession. The court of appeals' interpretation of Section 843(b) thus would have the effect of undermining Congress's decision to restrict the scope of the provision to facilitation of a drug "felony."

4. To the extent there is any ambiguity concerning the applicability of Section 843(b) to the purchase of drugs for personal use, the rule of lenity would require construing the provision in petitioner's favor. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *id.* at 2033-34 (Stevens, J., concurring); *Liparota v. United States*,

471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-48 (1971). Under that rule, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347 (internal quotation marks omitted).

Here, Congress failed to establish "in language that is clear and definite" that Section 843(b) encompasses the use of a telephone to purchase drugs for personal use. *Bass*, 404 U.S. at 347. For that reason as well, the court of appeals erred in upholding the application of Section 843(b) to petitioner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 13, 2008

APPENDIX

APPENDIX A
COURT OF APPEALS OPINION

United States Court of Appeals,
Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

Salman Khade ABUELHAWA, Defendant-Appellant.

No. 07-4639

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(1:07-cr-00018-LMB)

Argued: March 19, 2008

Decided: April 25, 2008

Before WILLIAMS, Chief Judge, SHEDD, Circuit Judge, and William L. OSTEEN, Jr., United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge Williams wrote the opinion, in which Judge Shedd and Judge Osteen joined.

COUNSEL

ARGUED: Timothy Joseph McEvoy, ODIN, FELDMAN & PITTLEMAN, P.C., Fairfax, Virginia, for Appellant. David Brian Goodhand, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Chuck Rosenberg, United States Attorney, Julie Warren, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

OPINION

WILLIAMS, Chief Judge:

Salman Khade Abuelhawa appeals his conviction and sentence for violating 21 U.S.C.A. § 843(b) (West 1999), which prohibits knowingly or intentionally using a communication facility in committing, causing, or facilitating the commission of certain felonies, including drug distribution. Abuelhawa argues that he cannot be convicted of violating § 843(b) because the drug distribution in question was his purchase of cocaine for personal use, a misdemeanor, *see* 21 U.S.C.A. § 844(a)(1) (West 1999 & Supp. 2007). He also contests the sufficiency of the evidence supporting his conviction under § 843(b). Disagreeing with Abuelhawa on both counts, we affirm.

I.

In early 2000, the Federal Bureau of Investigation ("FBI") began an investigation into possible cocaine distribution by Mohammed Said in the Skyline area of Virginia, just outside of Washington, D.C. During the course of this

investigation, in June 2003, the FBI applied for, and was granted, a Title III warrant to wiretap Said's cell phone.[1] In this case, the wiretap captures "both phone numbers, . . . the time of the phone call, the date of the phone call, [and] the duration of the phone call," anytime a call, either incoming or outgoing, occurs between the wiretapped phone and another phone. (J.A. at 125.) Agents are also able to "intercept the conversation that occurs" between the two phones. (J.A. at 125.) The FBI can then subpoena a telephone company to identify the subscribers of telephones used to make contact with the wiretapped phone.

In July 2003, FBI agents monitoring the wiretap of Said's cell phone issued a subpoena in an effort to identify the subscriber with the cell phone number 703-969-8743. From this subpoena, the FBI learned that the number belonged to Abuelhawa. Thereafter, the FBI monitored a series of calls between Said and Abuelhawa that form the basis of this appeal.

The wiretap recorded a total of eight calls between Abuelhawa and Said in early July 2003: the two men spoke twice on July 2, 2003, three times on July 5, and three times on July 12.[2] On July 2, at approximately 10:12 p.m., Abuelhawa called Said

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[1] The term Title III refers to the federal wiretapping statute (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510 *et seq.* (West 2000 & Supp. 2006)), which permits wiretapping by federal agents upon a showing of necessity. 18 U.S.C.A. § 2518 (West 2000).

[2] These conversations took place primarily in Arabic and were translated by a Government Arabic language specialist prior to trial. Neither party contests the accuracy of the translations.

and instructed: "Bring me the half by the Hilton or do you want me to come to you?" (J.A. at 318.) An FBI agent as well as an expert witness testified that Abuelhawa's reference to "the half," was to a half gram of cocaine. Said called Abuelhawa back at 10:20 p.m. Said asked Abuelhawa, "Where are you?," to which Abuelhawa replied, "I am coming to you." (J.A. at 319.) The call ended with Abuelhawa saying "I have seen you." (J.A. at 319.)

On July 5, 2003, the wiretap intercepted three additional calls between Abuelhawa and Said, beginning at 10:12 p.m. In the first call, Abuelhawa asked for "[o]ne of the small, 100 type," continuing, "[l]ike, like that time when you and I, when I saw As'ad."[3] (J.A. at 320.) Said answered, "Ah. Ok." (J.A. at 320.) Abuelhawa continued, "But please for God's sake, fix it well. May God keep you." (J.A. at 320.) Said responded, "Alright. Alright. Where?" (J.A. at 320.) Abuelhawa reported that he was still at home, and Said instructed Abuelhawa to "[w]ait for me in Skyline until I come back [from picking up my sister]." (J.A. at 320.) The Government's expert witness testified that the reference to the "100 type" was a reference to one gram of cocaine, which has a retail value between $80-$120.

At 11:17 p.m., Said called Abuelhawa to ask his whereabouts. Abuelhawa responded that he was "almost in the neighborhood" and asked to meet "[b]y the Eleven." (J.A. at 322.) Said responded, "No. No. Meet me out on the street that is after it. . . . In front of the street from where you are talking to me." (J.A. at 322.) Abuelhawa responded, "Fine. Ok." (J.A. at

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[3] As'ad was the name of Mohammed Said's father.

322.) Four minutes later, at 11:21 p.m., Said again called Abuelhawa and asked, "Have your excellency arrived?" (J.A. at 323.) Abuelhawa responded, "I have arrived man. . . . but there are two people at that . . . so I drove down a little further." (J.A. at 323.) Said and Abuelhawa discussed this latest development for a moment, with Said instructing Abuelhawa to "go further down" because "[i]t is better." (J.A. at 323.) Abuelhawa responded, "Fine. Ok," and Said said, "Alright." (J.A. at 323.) No further phone calls were intercepted on July 5.

Finally, on July 12, the FBI intercepted three calls between Said and Abuelhawa. First, at 8:30 p.m., Abuelhawa called Said and asked, "Where did the free stuff go? Is it gone?" (J.A. at 324.) Said responded in the affirmative, and Abuelhawa said, "We should celebrate that it is gone. It was good." (J.A. at 324.) Abuelhawa continued, "May God give you health. So will I see you after an hour?" (J.A. at 324.) Said said, "[A]lright," and then he asked, "How much do you need?" (J.A. at 324.) Abuelhawa responded, "A half." (J.A. at 324.)

At 9:18 p.m., Abuelhawa called Said again, and said, "Ok. Listen. Make it one of the big ones. The 100 type." (J.A. at 326.) Said assented and asked Abuelhawa when he would arrive; Abuelhawa responded, "I am, I am on my way. I am leaving home." (J.A. at 326.) The two men then agreed to meet at Said's "store." (J.A. at 326.) At 9:47 p.m., another call occurred between Said and Abuelhawa. (J.A. at 327.) Said asked where Abuelhawa was; Abuelhawa responded, "Right here. I am, I am coming to you in two minutes." (J.A. at 327.) Said expressed his desire to leave the shop, stating, "I

really want to leave this place." (J.A. at 327.) Abuelhawa pleaded, "I am coming to you man. One minute." (J.A. at 327.) Said relented and told Abuelhawa, "Come. Meet me at the grill. Ok. Bye." (J.A. at 327.) At trial, testimony from the Government established that Said's father owned the Skyline butcher shop and a restaurant called the Skyline Grill, which were located next door to each other. An FBI agent further testified that the Skyline Grill "is a location where Mohammed Said distribute[d] cocaine." (J.A. at 148.)

Based upon these intercepted telephone calls, Abuelhawa was placed under arrest at his home on October 17, 2003. After being advised of his *Miranda* rights, Abuelhawa agreed to speak with the FBI agents who arrested him and admitted that he purchased cocaine from Said and a dealer named Issam Khatib. Abuelhawa told the agents that he originally purchased cocaine, usually in one-half gram amounts, from Khatib and that Said became his dealer after Khatib left the business and Said assumed control of Khatib's customer base. Abuelhawa further told the agents that he used his cell phone to call Said's cell phone in order to buy cocaine in one-half gram amounts and that he and Said would usually meet outside of the Skyline Grill to complete the drug transactions. Said would hand the cocaine, in a tin-foil package, to Abuelhawa through Abuelhawa's car window. Abuelhawa gave no statements indicating that he purchased cocaine on the specific dates of July 5 and July 12.

On January 25, 2007, a federal grand jury sitting in the Eastern District of Virginia charged Abuelhawa in a seven-count indictment with

violating 21 U.S.C.A. § 843(b) and 18 U.S.C.A. § 2 (West 2000). The indictment charged Abuelhawa with unlawfully, knowingly, and intentionally using a communications facility—a telephone—in committing, causing, and facilitating the commission of a violation of 21 U.S.C.A. § 841(a)(1) (West 1999), distribution of cocaine. Counts Two through Four alleged violations of § 843(b) based upon the three July 5th phone calls, while Counts Five through Seven focused on the three July 12th calls. Count One, which was dismissed prior to trial for reasons not relevant to the appeal, focused on a phone call made on June 29, 2003.

Following the close of the Government's case-in-chief, Abuelhawa moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. The district court denied the motion, explaining:

> You may be right on the July 5 incidents. If that's all the government had, if they only had one set of conversations, I think I'd be granting your motion, but you have a week later a second round of conversations, and it seems to me it's not an unreasonable inference to draw the conclusion that if the first set of transactions had been unsuccessful, you'd have either heard some complaints or something in the second round.

(J.A. at 201-02.)

The jury thereafter convicted Abuelhawa on all six of the remaining counts in the indictment. Abuelhawa followed his oral Rule 29 motion with a later written one, which the district court denied prior to sentencing. The district court sentenced

Abuelhawa to 24 months probation and a $2,000 fine.[4] Abuelhawa timely noted an appeal, and we possess jurisdiction under 28 U.S.C.A. § 1291 (West 2006) and 18 U.S.C.A. § 3742(a) (West 2000).

II.

Abuelhawa pursues two arguments on appeal regarding his conviction. First, Abuelhawa contends that § 843(b) is not violated when an individual facilitates the purchase of a drug quantity for personal use. Second, Abuelhawa contends that, even assuming § 843(b) criminalizes such conduct, the Government produced insufficient evidence to show that a drug distribution occurred on either July 5 or July 12. We address each contention in turn.

A.

Whether § 843(b) extends to personal-use distributions is a question of statutory interpretation, which we review *de novo*, *see United States v. Nelson*, 484 F.3d 257, 260 (4th Cir. 2007), and we "begin with the language of the statute," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). We first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson*, 519 U.S. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

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[4] At that time, the district court also merged the convictions for Counts 3 and 4 into Count 2, and the convictions for Counts 6 and 7 into Count 5.

"The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Ron Pair Enters.*, 489 U.S. at 242 (internal quotation marks omitted).

Section 843(b) makes it "unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter." 21 U.S.C.A. § 843(b). Abuelhawa was convicted of committing, causing or facilitating the commission of a violation of 21 U.S.C.A. § 841(a)(1), which criminalizes distribution of controlled substances.[5] This distribution, Abuelhawa notes, was for his personal use.

Because there is no dispute that Abuelhawa used a communication facility (a cell phone) to arrange the drug transactions, we believe this case can be decided by focusing only on whether Abuelhawa facilitated the commission of a felony. We begin with the recognition that our sister circuits are divided on the issue facing us; some find that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated. *See United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1990); *United States v. Martin*, 599 F.2d 880, 888-89 (9th Cir. 1979) *overruled on other grounds by United States v. DeBright*, 730 F.2d 1255 (9th Cir.

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[5] Cocaine is a Schedule II controlled substance, covered by 21 U.S.C.A. § 841(a)(1) (West 1999).

1984).[6] These circuits take the position that "a mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress." *Martin*, 599 F.2d at 889. In contrast, other circuits have concluded that distributions for personal use are covered by § 843(b). *See United States v. Binkley*, 903 F.2d 1130, 1135-36 (7th Cir. 1990); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. Unit B Dec. 1981) *overruled on other grounds by United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992).[7] The Seventh Circuit, in

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[6] Abuelhawa also cites to *United States v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) in support of his position. In *Van Buren*, however, the Sixth Circuit addressed whether use of a telephone to purchase drugs for personal use furthered a drug *conspiracy*, not whether 21 U.S.C.A. § 843(b) (West 1999) extends to personal use distributions. Instead, it appears that the Sixth Circuit does not agree with Abuelhawa. *See United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984) ("To prove 'facilitation,' the government must show that the 'telephone call comes within the common meaning of facilitate-'to make easier' or less difficult, or to assist or aid. It is sufficient if a defendant's use of a telephone to facilitate the possession or distribution of controlled substances facilitates either his own or another person's possession or distribution." (quoting *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. Unit B. Dec. 1981))).

[7] *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B Dec. 1981) is binding precedent in both the Fifth and Eleventh Circuits. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1422 n.8 (5th Cir. 1996) (noting that all cases decided by Unit B panels of the Former Fifth Circuit are binding precedent in the Fifth Circuit); *Stein v. Reynolds Sec. Inc.*, 667 F.2d 33, 34 (11th Cir. 1982) (noting that decisions by Unit B panels of the Former Fifth Circuit are binding precedent in the Eleventh Circuit).

Binkley, noted the term "facilitate" "should be given its ordinary meaning, which is, simply, 'to make easier.'" *Binkley*, 990 F.2d at 1135 (quoting *Phillips*, 664 F.2d at 1032). *See also McLernon*, 746 F.2d at 1106 (same). And, by placing the focus on the *use* of a communications device to make a distribution easier, a defendant's "subsequent treatment of the cocaine cannot retroactively diminish [the defendant's] previous facilitation of . . . [a] cocaine sale." *Binkley*, 990 F.2d at 1136.

Although we have not adopted either position, we have previously indicated our agreement with *Phillips*, *McLernon*, and *Binkley* that, for purposes of § 843(b), "facilitate" should be given its "common meaning—to make easier or less difficult, or to assist or aid." *United States v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988) (internal quotation marks omitted). Faced directly with the issue confronted in those cases, we believe those circuits also have the better of the argument as to whether § 843(b) applies to facilitation of a drug distribution for personal use.

Section 843(b) has as its essential elements knowing or intentional use of a communication facility to commit, cause, or facilitate certain enumerated felonies. The statute does not specify *whose* felony must be at issue, just that "a" felony must be facilitated. Cocaine distribution is a felony, 21 U.S.C.A. § 841(a)(1), and Abuelhawa's use of his cell phone undoubtedly made *Said*'s cocaine distribution easier; in fact, "it made the sale possible."[8] *Binkley*, 903 F.2d at 1136. The fact that

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[8] As one of our district courts has stated, "the decisions of the Fifth and Seventh Circuit appropriately focus on the

Abuelhawa's possession of cocaine for personal use may not itself be a felony, 21 U.S.C.A. § 844(a)(1), is simply irrelevant under § 843(b). As the Seventh Circuit explained,

> If, by their use of the telephone, the appellants have made the distribution of the cocaine easier, they have facilitated it and violated the statute. What they do with the cocaine after it is distributed is irrelevant to whether they facilitated the distribution; the crime is complete long before they either use or dispose of the cocaine.

United States v. Kozinski, 16 F.3d 795, 807 (7th Cir. 1994) (internal citations omitted).

Abuelhawa believes this result is nonsensical because, if he had simply approached Said on the street and purchased one-half gram of cocaine, his conduct would be punishable only as a misdemeanor. Abuelhawa thus argues it is beyond logic that his use of a cell phone to contact Said transforms his possession offense into a felony. Congress, however, may well have had reason for such a result: use of communication facilities makes it easier for criminals to engage in their skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement. At any rate, Abuelhawa's contention certainly fails to prove that

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defendant's use of a communication facility in the 'making easier' of the completion of any felony under the Controlled Substances Act." *United States v. Lewis*, 387 F. Supp. 2d 573, 584 (E.D. Va. 2005).

our result is "demonstrably at odds," *Ron Pair Enters.*, 489 U.S. at 242 (internal quotation marks omitted), with congressional intent, best expressed in the plain language of § 843(b), which references only "a felony." 18 U.S.C.A. § 843(b).

We thus join the Fifth, Sixth, Seventh, and Eleventh Circuits in concluding that persons like Abuelhawa, who facilitate distribution of a controlled substance to themselves for personal use by using a communication facility, can be prosecuted for violating § 843(b). Quite simply, "status as buyer[ ] or distributor[ ] is of no consequence regarding section 843(b); rather, [a defendant's] status as [a] facilitator[ ] alone gives rise to criminal liability." *Kozinski*, 16 F.3d at 807.

B.

In the alternative, Abuelhawa contends that the Government failed to prove a violation of § 843(b) in this case because it failed to show the occurrence of an actual drug distribution on either July 5 or July 12. Abuelhawa bears a "heavy burden" in contesting the sufficiency of the evidence supporting a jury verdict. *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997) (internal quotation marks omitted). His conviction must be affirmed if, reviewing the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Burgos*, 94 F.3d 849, 862-63 (4th Cir. 1996) (en banc). The Government receives the benefit of "all reasonable inferences from the facts proven to those sought to

be established." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982) (citations omitted).

In contesting the sufficiency of the evidence, Abuelhawa focuses upon what he categorizes as lacking in the Government's case: the actual drugs, the absence of witness testimony or objective evidence that Abuelhawa and Said ever met on July 5 or July 12, and the lack of admissions from Abuelhawa that he purchased cocaine from Said on either July 5 or July 12. Abuelhawa points us to *Baggett*, in which the Tenth Circuit required the Government, in a prosecution for narcotics *possession*, to "put forth some evidence to show that [a defendant] actually possessed heroin on the day in question." *Baggett*, 890 F.2d at 1096.

In *Baggett*, the defendant was charged with possession of heroin on November 29, 1987. *Id.* The Government put forth evidence that the female defendant Baggett made three calls to a drug dealer on that day to purchase heroin and cocaine at a set location, that a female emerging from a car registered to Baggett was seen at that set location entering the drug dealer's car twice on November 29, and that in March 1988 Baggett gave statements to the police that she used heroin during the month of November 1987. *Id.* In reversing Baggett's conviction, the Tenth Circuit proceeded, based upon our opinion in *United States v. Dolan*, 544 F.2d 1219 (4th Cir. 1976), to list several means by which the Government could prove actual *possession*.[9] *Baggett*,

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[9] The Tenth Circuit quoted from the following passage from *United States v. Dolan*, 544 F.2d 1219 (4th Cir. 1976):

890 F.2d at 1096. In *Dolan*, however, we addressed examples of evidence the Government could use to prove the *identity* of a substance in lieu of expert testimony. *Dolan*, 544 F.2d at 1221.

The Tenth Circuit read *Dolan* for the broader proposition that "[i]f the prosecution is not going to present direct evidence of drug possession, its circumstantial evidence must include some testimony linking defendant to an observed substance that a jury can infer to be a narcotic." *Baggett*, 890 F.2d at 1097. *See also United States v. Hall*, 473 F.3d 1295 (10th Cir. 2007) ("While other courts have not gone so far as to require that evidence include an 'observed substance that a jury can infer to be a narcotic,' there is little doubt that a defendant's own inculpatory statements captured on wiretaps must be corroborated by other circumstantial evidence of possession such that a

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> [L]ay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identi[t]y of the substance involved in an alleged narcotics transaction. Such circumstantial proof may include evidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence[.]

Id. at 1221 (internal citations omitted).

jury may properly infer the specific drug was actually possessed.").

While the Tenth Circuit may have extended *Dolan*'s inexhaustive list for proving a substance's identity into a rigid proof requirement for all charges of narcotics possession, we decline to do so. We have never placed such a burden on the Government, and "we decline to give a checklist or formula for sufficiency." *United States v. Bryce*, 208 F.3d 346, 353 (2d. Cir. 2000).

Instead, when "we look at what facts *did* exist in this case," *United States v. McCoy*, 513 F.3d 405, 412 (4th Cir. 2008), we conclude the Government produced sufficient evidence of a completed distribution on both July 5 and July 12. To prove these offenses, the Government put forth three phone calls on both July 5 and July 12 orchestrating drug transactions between Abuelhawa and Said. All three calls took place in short time frames, setting up the exact details of the transaction. No calls were made indicating the transactions failed, and the July 12 phone calls make no mention that the July 5 transaction was not consummated. Expert testimony explained that Abuelhawa used "code words" during the calls indicating his desire to purchase one-half gram and one gram amounts of cocaine. Abuelhawa told investigators that he normally purchased cocaine in one-half gram amounts from the Skyline Grill, the business mentioned in the final call on July 12. We think from this evidence, including the confirmatory statements from Abuelhawa that he purchased cocaine from Said, a reasonable jury could infer that

Said completed a distribution on both July 5 and July 12.

In particular, a reasonable jury could infer that had Said not in fact distributed cocaine to Abuelhawa on July 5 after indicating that he was on the very street where he and Said were scheduled to meet, one of them might have mentioned the failed transaction in the July 12 calls. As to July 12, the final call concludes with Abuelhawa stating that he is "[o]ne minute" away from Said, (J.A. at 327), and Said agreeing to meet Abuelhawa at the Skyline Grill, where Abuelhawa later admitted was his normal destination for cocaine purchases. Again, viewing this evidence in the light most favorable to the Government, and drawing all reasonable inferences in its favor, we believe a reasonable jury could certainly have found Abuelhawa guilty of violating § 843(b) for facilitating Said's cocaine distribution on July 12 as well. Given the immediacy of the final call between Abuelhawa and Said, a reasonable jury could conclude that, if the transaction was not consummated, a further call would have been made.

Much of Abuelhawa's argument focuses on the Government's presentation of only circumstantial evidence to support its case. We have explained that "as a general proposition, circumstantial evidence may be sufficient to support a guilty verdict even though it does not exclude every reasonable hypothesis consistent with innocence." *United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008) (alteration and quotation marks omitted). With this proposition in mind, and under our deferential standard of review, we conclude that the

Government provided sufficient evidence to support the jury's verdict.

III.

Because we hold that § 843(b) criminalizes facilitation of drug distributions for personal use, and that the Government adduced sufficient evidence that Abuelhawa violated § 843(b) on July 5 and July 12, Abuelhawa's conviction and sentence must be and is

AFFIRMED.

APPENDIX B

TRANSCRIPT OF DISTRICT COURT JURY TRIAL AND SENTENCING

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

v.

Salman Khade ABUELHAWA, Defendant

Criminal No. 1:07cr18

Alexandria, Virginia
March 29, 2007
10:17 a.m.

EXCERPT

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

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STENOGRAPHIC NOTES

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MR. McEVOY: The other argument, which was raised in the trial briefs, is that this simply isn't a crime. I mean, we don't have any—what we have is testimony that there was cocaine involved or purchased by my client, viewing it in the light most favorable to the government, that weighed somewhere between the weight of a U.S. dime and a U.S. nickel.

There is no contention that this is a dealing case. Mohammed Said according to the government was the dealer, not my client. And under the case law that I presented and a Supreme Court case that we contend applies by analogy, three circuits and Judge Cudahy in the Seventh Circuit in dissent in a case

that goes the other way, three circuits to two circuits say this just isn't a crime.

THE COURT: And the Fourth Circuit hasn't said anything.

MR. McEVOY: Hasn't said anything, that's right, but—

THE COURT: Well, I understand that, but, I mean, if one literally reads the statute, a distribution is a distribution. It can be a tenth of a gram. It still is a person—if from person A to person B, person A gives a minuscule but detectable amount of cocaine to a second person, that's a distribution. You know that from the law.

MR. McEVOY: But—

THE COURT: And if the distribution is in any way facilitated—I'm just reading the straight words of the statute. While I understand in a case like this, it may not make sense to ratchet up what would probably be a simple possession case to a felony, but that's a prosecution decision that the U.S. Attorney's Office has made, that's an issue to be considered down the road, depending upon what happens, but in terms of just a literal reading of the statute, I don't think it's at all straining the language to find that it would apply to a situation like this, because but for the phone conversation, this particular distribution would not have occurred. So it facilitated.

MR. McEVOY: Well, I mean, obviously, Your Honor knows we strongly disagree.

THE COURT: I mean, I respect your argument, you know, and obviously, several circuits have found

that that's not an appropriate reading of the statute, but I don't see anything in the language of the statute that would suggest to the contrary.

MR. McEVOY: Except, Your Honor, that the—it talks about causing, committing, or facilitating. Causing—I may have the words wrong, but two of the words are clearly birds of a feather, if you will.

Should I—

THE COURT: Committing, causing, or facilitating the commission.

MR. McEVOY: Right.

THE COURT: All right. So it's committing the commission, causing the commission, or facilitating. In other words, "facilitate" means to make easier, but causing, if I call you to order something and you then deliver it to me, haven't I caused the delivery?

MR. McEVOY: I don't think that simply presenting an opportunity causes anyone to do anything. That's like saying that because I opened the doors of a bank one day, that I caused the guy to come in and rob it. I mean, I don't cause anybody to do anything. I may make it—you know, I may open the door, but that's not, that's not causing.

And I think the use of the word "facilitating," I don't think that Congress had in mind, you know, by using sort of a separate word, "buyers," and saying that you can facilitate your own deals.

THE COURT: Well, I mean, the problem is there are different—I really don't have a problem in finding that at least a cause prong is met when a purchaser calls. If I call L. L. Bean and order a shirt,

I have caused through that telephone call, I caused L. L. Bean to ship a shirt to me. That's a distribution of the shirt. If it were drugs, that would be the same thing.

So I don't see a problem just reading the language of the statute in finding that if you, if you order drugs by telephone, you have caused—and they're distributed, you have caused a distribution.

MR. McEVOY: May I—not to tax the Court's patience, but—

THE COURT: You're not. This is an interesting discussion.

MR. McEVOY: But I think the additional—but I think, Your Honor, what the *Ruiz* Supreme Court case, which talked about facilitate in terms of the Travel Act, in that case, there were four people prosecuted, two people in Florida who ran a gambling ring, two people in Georgia who crossed state lines to place bets, and the Supreme Court said, look, we are not going to allow bettors who place bets to be prosecuted.

That's not facilitation that we think Congress ever intended to punish—

THE COURT: But this statute has more than facilitate—and you know yourself any one of those verbs alone, I mean, the statute charges three different actions: committing, causing, or facilitating, any one of them, it doesn't have to be all three, and in this case, it really is, I think, a cause, the causing.

MR. McEVOY: I think, Your Honor, though, that the trouble that I have with it and the trouble that I—why I believe Congress couldn't have ever

intended for it to apply to people like my client is that especially now, you know, just the Court trying these types of cases knows everybody's using cell phones, and what a gigantic net, you know, felonizing a gigantic group of people that, you know, in some circuits, it's not a crime, and I guess, you know, maybe here the U.S. Attorney's Office can now come in and say, hey, you're going to be guilty of a felony, you know, Simple User, unless you roll, and I just don't think that—

THE COURT: Well, as you know, I mean, we all know there's a history to this particular case, and I don't know because I didn't study the old part of the case whether your client's alleged involvement in the conspiracy, which is what he was originally going to plead guilty to, was higher than just being a small-time buyer. I don't know what else, if anything, he was doing with Said or the other people.

The government for whatever reasons chose to proceed this way. They could clearly—if all your client was involved with was buying an occasional half-gram of cocaine to feed a habit, if that's it, you know, a misdemeanor might have been a more appropriate charge, but you know the Court doesn't get involved with that.

We are where we are today because of charging decisions they've made, and that's the case you're defending.

MR. McEVOY: Well, just for whatever it's worth, I believe that if it were all hashed out, what you see is what you get. I don't believe that there's more—I don't believe that the government could have ever convicted him at trial of being possessing with intent

or, you know, such crime, but anyway, that's—it's not before us. I understand the Court's position. We respectfully disagree.

* * * * *

CLOSING ARGUMENT

BY MR. LEISER:

Ladies and gentlemen, thank you for your time and attention to this point in the proceedings. It's my responsibility as a representative of the United States to sum up for you what I believe the evidence is in this case. This is a short case. This shouldn't take very long. It should be all fresh in your minds.

Obviously, whatever I say is not evidence. As the Court instructed you earlier, it's your recollection of the evidence. If I say something that's inconsistent with your recollection, your recollection must control. I'm going to try to do the best I can to be consistent with your recollection.

At this point in the proceedings, having heard all of the evidence, I hope you're convinced of the guilt of this defendant. I don't know whether you are or you're not, so if I insult you by going on and going over some of these facts, that's my job, and I don't mean to do that.

There's a statute in this particular point—or case that's pretty clear. Any person who knowingly or intentionally uses any communication facility in committing or causing or facilitating the commission of any act or acts constituting a felony, here the distribution of cocaine, shall be guilty of an offense

against the United States. It doesn't matter whether it's a millimeter of cocaine or 18 kilograms of cocaine. It doesn't matter.

Now, the elements of the offense are pretty straightforward: Did the defendant knowingly and intentionally use a cell phone. Is there any doubt in your mind that he knowingly—nobody put a gun to his head to have him get on the phone and order up the cocaine.

When he didn't think anybody was listening, he picked up the phone of his own free will on the three dates that you have evidence on of him doing this and ordered cocaine from his supplier, Mr. Mohammed Said, who was his second supplier. He told the agent, Agent Ashooh, when he was arrested and Mirandized that Mr. Khatib was his original supplier and he used to buy his cocaine through him, but same methodology, calling up on the phone talking in coded language, and that they'd make the deliveries. So there shouldn't be any problem in resolving the first element of his using the telephone facility.

If you look at the second element, which is was that use by him of the telephone, was it intended to facilitate or to cause the distribution of cocaine by Mohammed Said to the defendant, just ask yourselves a simple question: But for the use of that

telephone, would the transaction have taken place? If they didn't get on the phone and if he didn't order the cocaine and if he didn't after he ordered it, reordered it, or arranged for the meeting place and they're fine-tuning the meeting in those three conversations that you have to be concerned with on the two dates, July 5 and July 12, he places the order in the first conversation, then they fine-tune where they're going to meet, how they're going to meet, and then finally they meet, and obviously, as a result of their planning and plotting, there's a distribution.

With regard to the intent of the parties here, you have the conversations. Unfortunately, they're in Arabic, so you can't listen to them, but you can read what was said, and I suggest to you when you look at those conversations, you can only conclude that there was an intent to, A, use the phone; B, to facilitate the distribution of cocaine; and finally, the acts that they intended to do obviously occurred.

* * * * *

THE COURT: We are going to do the jury instructions now then.

All right, ladies and gentlemen, these instructions or what I am about to say to you are being tape-recorded so that if you should need to refresh yourselves about anything I've said, you let us know, and we'll give you the tape. You will not be getting written instructions.

Now that you have heard all of the evidence to be received in this trial and each of the arguments of counsel, it becomes my duty to give you the final instructions of the Court as to the law that is applicable to this case and which will guide you in your decisions.

* * * * *

And I'm now going to give you a synopsis of the charges. Counts 2, 3, and 4 each relate to the date of July 5, 2003. Count 2 relates to a phone conversation at 10:12 p.m. that date; Count—I'm sorry, that's Count 2. Count 3 relates to a phone call at 11:17 p.m. on July 5, 2003, and Count 4 relates to a phone call at 11:21 p.m. on July 5, 2003.

And Counts 2, 3, and 4 each allege on July 5, 2003, at the respective times I've indicated, that the defendant did unlawfully, knowingly, and intentionally use a communication facility, that is, a telephone, in committing, causing, and facilitating the commission of a violation of Title 21 of the United States Code, section 841(a)(1), that is, the distribution of cocaine, which is a Schedule II controlled substance.

Counts 5, 6, and 7 charge the exact same offense, that is, using a communication facility, a telephone, in committing, causing, and facilitating the commission of a violation of Title 21, that is, distribution of cocaine, but the date involved in these three counts is July 12, 2003, and the times of the

alleged use of a phone are 8:30 p.m. as to Count 5, 9:26 p.m. as to Count 6, and 9:47 p.m. as to Count 7.

Now, all six counts therefore involve the same statute, and the statute is numbered as section 843(b) of Title 21 of the United States Code, and that law provides in part as follows:

"[A]ny person [who] knowingly or intentionally . . . use[s] any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter"—blank, blank, blank—"shall be guilty of an offense against the United States."

Now, for every crime, there are what we call essential elements. These are sort of the necessary components to make up a criminal act, and you should think about—I sometimes tell jurors to think about the essential elements like ingredients in a recipe. If you've got a recipe for a cake and it calls for eggs and butter and sugar and you don't have eggs, butter, and sugar, you're going to have a mess. You're not going to have that cake.

Well, essential elements work the same way. Every crime has a different set of them. The 843(b) statute, that is, the statute that's at issue in all counts of this case, has three essential elements. Now, it is the burden of the government to prove each and every essential element beyond a reasonable doubt in order for the jury to find the defendant guilty of that offense.

Let's say that there's an offense that has four essential elements and the jury were satisfied beyond a reasonable doubt that the government's evidence established three of the elements but not

the fourth. The jury could not convict the person of the crime, because the government had not met its burden.

So the three essential elements that the government must prove for each of these six counts are the following:

First, that the defendant used a communication facility, which all parties agree in this case was a telephone; second, that the defendant used the communication facility, that is, that the defendant used the telephone, to cause or facilitate the commission of a drug offense, in this case, the cocaine distribution; and three, that the defendant did so knowingly and intentionally.

So the three elements for a, what we call sometimes a wire count violation are, No. 1, use of the communication facility; two, that the facility was used to cause or facilitate the commission of a drug offense, which specifically in this case is the distribution of cocaine; and three, that the defendant did so knowingly and intentionally.

Now, the second element, that is, that the defendant used the communication facility, the telephone, to cause or facilitate the commission of a drug offense, that is, cocaine distribution, requires that the government prove the commission of the underlying substantive drug offense, and the distribution of cocaine is an act constituting a felony under Title 21 of the United States Code.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

v.

Salman Khade ABUELHAWA, Defendant

Criminal No. 1:07cr18

Alexandria, Virginia
March 29, 2007
10:17 a.m.

EXCERPT

TRANSCRIPT OF SENTENCING
BEFORE THE
HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Pages 1 - 21)

COMPUTERIZED TRANSCRIPTION OF
STENOGRAPHIC NOTES

* * * * *

PROCEEDINGS

(Defendant not present.)

THE CLERK: Criminal Case No. 07-18, United States of America v. Salman Khade Abuelhawa. Will counsel please note your appearances for the record.

MR. LEISER: Good morning, Your Honor. Lawrence Leiser on behalf of the United States.

MR. McEVOY: Good morning, Your Honor. Tim McEvoy for the defendant.

THE COURT: All right. And the defendant is here.

(Defendant present.)

THE COURT: All right, Mr. McEvoy, we have first of all your motion for a judgment of acquittal, and within that motion is a motion to merge counts of conviction.

MR. McEVOY: Yes, Your Honor.

THE COURT: All right. I have fully reviewed your motion. It is definitely an interesting issue that you raise, and it's an issue that really has not been resolved by the Fourth Circuit. Some circuits have looked at the issue, and as you recognize, there are—there's a split among the circuits.

I have in particular looked at the decision of Judge Friedman in United States v. Lewis, at 387 F. Supp. 2d 573. It's a 2005 decision in which Judge Friedman very thoroughly went over the existing law at that point, and he concluded that the Fourth Circuit would likely agree with the decisions of the Fifth and Seventh Circuits, which does go against your position.

I think his opinion is extremely well reasoned, and I articulated for you during the trial my view on some of these issues as to whether a person who orders drugs using a wire facility causes or facilitates the distribution. I am for the reasons stated by Judge Friedman in his opinion as well as what the Court articulated during the trial going to deny the motion for a judgment of acquittal as a matter of law on your legal argument.

To the extent you've argued that there was insufficient evidence to support the convictions of your client, I'm also going to deny that motion. As you know, a jury is expected to use reasonable common sense and is permitted and the jury

instructions so instruct to draw reasonable inferences from the evidence presented during the trial, and although you are correct that there was no direct evidence of an actually consummated drug distribution, the combination of among other things the Title III wiretaps and the admissions your client made at the time of arrest plus the other evidence in the case would allow in my view a reasonable jury to come to the conclusions that it did in convicting your client, and so for those reasons, the motion will be denied and is denied.

However, as I indicated during the trial, this is a case where the government could easily have chosen different ways of charging the case, and what we had here was on two different dates, the date of July 5 and the date of July 12, on each day, three phone calls. On July 5, the phone calls were between 10:12 and 11:55 p.m., basically over an hour, three very short phone calls concerning one distribution of cocaine, and three similarly closely related phone calls between 8:30 and 9:47 p.m. on July 12.

The government charged each of those six phone calls as a separate standalone count, and the jury received the case in that posture, but I agree with you that I think that that's overkill, that it was one event. Three phone calls in one event in that close a time period in my opinion are sufficient to be merged, and it's appropriate to merge them.

So I'm going to merge the convictions on Counts 1, 2, and 3 into just one conviction, and for the purpose of recordkeeping, we'll call it Count 1, so I'm merging 2 and 3 into Count 1, and I'm merging 5 and 6 into Count 4, and the judgment order will therefore

reflect—I'm not going to dismiss them. I mean, they should have been, in my view, charged as one event occurring on those respective dates, but the record will reflect a conviction of Counts 1 and 3, with the other counts merged into them.

And I know the government doesn't agree with that view, but that's going to be the decision of the Court in that respect, all right?

MR. McEVOY: Yes, Your Honor. Before we move off that, just so there's no confusion, I think the government moved to dismiss the original Count 1.

THE COURT: I'm sorry, you're right. Count 1 was dismissed, so I'm sorry, so it's Counts 2, 3, and 4, and 5, 6, and 7 were the ones which went to trial, thank you. So the defendant will have Counts 3 and 4 merged into 2 and 6 and 7 merged into 5.

* * * * *

[THE COURT:] Your client has not walked away from the admission that he is a cocaine user.

MR. McEVOY: That's correct.

THE COURT: And the essence of his involvement in this case was he was calling his supplier to order drugs. He had a legitimate legal argument which down the road you may be successful with that the conduct involved in this case does not amount to a violation of 843.

A defendant has a right to maintain an appropriate legal argument, and this one clearly is. There's a split among the circuits, as I've acknowledged earlier, and the Fourth Circuit has

not addressed this issue, but he has not walked away from his involvement with drugs, and I think that is a sufficient acceptance of responsibility, so I am going to reduce the offense level to a level 10.

With a criminal history I, that is going to establish a zone B sentence range of six to twelve months on both counts. The fine range would be 2,000 to 20,000 dollars.

The period of supervised release that would be available in this case does not change from what was included in the original guideline calculations, which would be—hold on a second—two to three years per count of conviction. Probation is available, and there would be up to $100 of special—I'm sorry, there would be a $100 special assessment per count of conviction, two counts of conviction.

So those are the guidelines that the Court is going to be using, the advisory guidelines the Court is going to be using.

All right, Mr. Leiser, let me hear you first as to the government's position on sentence in this case.

* * * * *

APPENDIX C

ORDER DENYING REHEARING EN BANC

FILED: May 23, 2008

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 07-4639

(1:07-cr-00018-LMB)

UNITED STATES OF AMERICA, Plaintiff - Appellee

v.

SALMAN KHADE ABUELHAWA, Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 15 2008
OFFICE OF THE CLERK

No. 08-192

In the Supreme Court of the United States

SALMAN KHADE ABUELHAWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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71723

QUESTION PRESENTED

Whether petitioner "use[d] [a] communication facility * * * in causing or facilitating * * * a felony" drug distribution, in violation of 21 U.S.C. 843(b), by using his cell phone to arrange with a drug dealer several purchases of cocaine for his own personal consumption.

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In the Supreme Court of the United States

No. 08-192

SALMAN KHADE ABUELHAWA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 523 F.3d 415.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008. A petition for rehearing was denied on May 23, 2008 (Pet. App. 37a). The petition for a writ of certiorari was filed on August 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of using a communication facility in causing or facilitating a felony drug distribution, in violation

of 21 U.S.C. 843(b). He was sentenced to two years of probation. The court of appeals affirmed. Pet. App. 1a-18a.

1. In July 2003, federal agents investigating Mohammed Said, a suspected cocaine dealer, intercepted a series of cell-phone conversations between petitioner and Said. On the night of July 5, 2003, the agents intercepted three calls. Petitioner initiated the first call and asked Said for a gram of cocaine. Said called petitioner back to ask where he was, and the two men agreed on a rendezvous point. During the third call, petitioner told Said that petitioner had arrived at the arranged location but that there were some other people there. To avoid detection, the two agreed on a different location. Pet. App. 4a-5a; see Gov't C.A. Br. 6-11.

On the night of July 12, 2003, the agents intercepted three more calls. Petitioner initiated the first call and asked Said for another half gram of cocaine. Nearly an hour later, petitioner again called Said, this time to increase his order to a full gram of cocaine and to ask where the two should meet. Said told petitioner to meet him at a butcher shop owned by Said's father. Petitioner agreed, indicating that he would be on his way immediately. About half an hour after the second call, Said—apparently nervous that the authorities would detect the drug sale because he had been loitering near the butcher shop for too long—called petitioner back, asking where petitioner was and stating that "I really want to leave this place." Pet. App. 5a-6a; see Gov't C.A. Br. 11-13. Petitioner responded: "I am coming to you man. One minute." Pet. App. 6a. Said relented and told petitioner to meet him at the restaurant next door to the butcher shop. *Ibid.*

Based on the intercepted calls, agents arrested petitioner. When questioned, petitioner admitted that he had long purchased cocaine from a man named Issam Khatib; that when Khatib quit the drug trade, Said assumed control of his customer base; that petitioner then began ordering cocaine from Said; and that petitioner regularly used his cell phone to place his orders with Said and to arrange the deliveries. Pet. App. 6a.

2. A grand jury in the Eastern District of Virginia charged petitioner with seven counts of using a communication facility (his cell phone) in causing or facilitating Said's felony distribution of a Schedule II controlled substance (cocaine), in violation of 21 U.S.C. 843(b).[1] That provision makes it unlawful "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony" in violation of the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* Count 1 of the indictment charged a June 29, 2003, call not at issue here, and the government dismissed it before trial. Counts 2 through 4 charged the three July 5 calls, and Counts 5 through 7 charged the three July 12 calls. Pet. App. 6a-7a.

Petitioner pleaded not guilty, and the case proceeded to trial. The government presented evidence pertaining to the cell-phone calls. C.A. App. 110-199. At the close of the government's evidence, petitioner moved for a judgment of acquittal, arguing among other things that no rational juror could convict him because causing or facilitating a drug distribution by using a cell phone "simply isn't a crime" where the cell-phone user buys

[1] Said pleaded guilty in a related case, and he was sentenced to 87 months of imprisonment. Petitioner's Presentence Investigation Rep. para. 7.

the drugs for personal consumption. *Id.* at 202. The district court denied the motion. Pet. App. 7a.

The jury found petitioner guilty on Counts 2 through 7. Pet. App. 7a; C.A. App. 209-210. Petitioner again moved for a judgment of acquittal, reasserting his claim that "ordering personal use drugs on the telephone is not a violation of 21 U.S.C. 843(b)." *Id.* at 275. The district court again denied the motion. Pet. App. 7a, 33a-34a. The court sentenced petitioner to two years of probation. *Id.* at 7a-8a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Petitioner argued that Section 843(b) "is not violated when an individual facilitates the purchase of a drug quantity for personal use," since the purchase of cocaine for personal use is a misdemeanor, not a felony. Pet. App. 8a; see 21 U.S.C. 844. The court rejected that argument. The court noted that petitioner did not dispute that he had "used a communication facility (a cell phone) to arrange * * * drug transactions." Pet. App. 9a. Accordingly, the court reasoned that the case could "be decided by focusing only on whether [petitioner] facilitated the commission of a felony." *Ibid.* Giving the term "facilitate" its "common meaning"—namely, "to make easier or less difficult"—the court observed that petitioner's "use of his cell phone undoubtedly made *Said*'s cocaine distribution easier." *Id.* at 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)). Because Said's distribution of cocaine to petitioner was a felony under 21 U.S.C. 841(a)(1), the court concluded that petitioner's use of his cell phone to help arrange the distribution fell squarely within the coverage of Section 843(b). Pet. App. 11a-13a.

In reaching that conclusion, the court of appeals emphasized that "the statute does not specify *whose* felony

must be at issue, just that 'a' felony must be facilitated." Pet. App. 11a. The court therefore considered it "irrelevant" that petitioner's possession of cocaine for personal use was "not itself * * * a felony." *Id.* at 12a. In the court's view, Congress "had reason" to impose additional punishment—beyond punishment for simple possession—upon personal-use defendants who employ communication facilities such as cell phones to arrange drug transactions: "[U]se of communication facilities makes it easier for criminals to engage in their skullduggery, and Congress may have reasonably desired to increase criminal penalties for those who use such means to evade detection by law enforcement." *Ibid.*

ARGUMENT

Petitioner renews his argument (Pet. 16-25) that 21 U.S.C. 843(b) does not extend to a defendant's use of a communication facility in causing or facilitating a felony drug distribution where, as here, the defendant is purchasing the drugs for personal consumption. The court of appeals correctly rejected that contention, which finds no support in the language of the statute. Although the court's decision conflicts with the Tenth Circuit's decision in *United States* v. *Baggett*, 890 F.2d 1095 (1989), petitioner overstates both the scope of the conflict (Pet. 8-13) and the need for this Court's immediate intervention (Pet. 13-16). Further review is not warranted.

1. In pertinent part, 21 U.S.C. 843(b) makes it a felony "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under" the Controlled Substances Act, 21 U.S.C. 801 *et seq.* As the court of appeals observed, pe-

titioner does not dispute that he "use[d]" a "communication facility" (his cell phone) to arrange cocaine transactions with Said. Pet. App. 9a. Nor does he dispute that Said's distribution of cocaine to petitioner was a felony under 21 U.S.C. 841(a)(1). Instead, petitioner argues (Pet. 16-25) that he could not have "facilitat[ed]" Said's felony because he bought the cocaine for personal consumption only; Section 844(a) punishes possession of personal-use quantities of cocaine as a misdemeanor; and Congress could not have meant to impose additional, felony punishment on him for using a cell phone to arrange the transactions through which he obtained the cocaine. The court of appeals correctly held otherwise.

a. The plain language of Section 843(b) applies to "*any* person" who uses a telephone in "causing" or "facilitating" an act that is a felony under the CSA—including those who do so in an effort to obtain drugs for personal use. 21 U.S.C. 843(b) (emphasis added). In ordinary language, a "cause" is something that "brings about an effect or that produces or calls forth a resultant action." *Webster's Third New International Dictionary of the English Language* 356 (1993) (*Webster*); see *ibid.* (defining "cause," in its verb form, as "to serve as cause or occasion of"). Petitioner does not dispute that his calls to Said brought about Said's felony distributions to petitioner. Indeed, he does not address the "causing" prong of the statute at all, even though it was charged in the indictment, and the district court found the government's evidence sufficient to meet it. C.A. App. 11-16, 203-206. Nor does he take issue with the court of appeals' observation that the "common meaning" of "facilitat[e]" is "to make easier or less difficult." Pet. App. 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)); accord *Webster* 812. Indeed, he did not

object when the district court instructed the jury that "[t]he term 'to facilitate the commission' means to * * * in some way make the task less difficult." C.A. App. 250; see *id.* at 258. Nor, finally, does he dispute that his calls to Said made Said's felony distributions easier, especially by enabling Said to avoid detection. See Pet. App. 4a-6a; Gov't C.A. Br. 6-13.

Instead, petitioner argues (Pet. 18) that the court of appeals should have recognized an atextual exception for any "person who uses a telephone to purchase drugs for personal use" because, he says, a buyer cannot aid or abet a distribution offense. Even assuming that a buyer may not be liable for aiding and abetting an unlawful distribution, that is beside the point under the plain terms of Section 843(b). Petitioner was not charged with a distribution offense, nor was he charged with aiding or abetting such an offense. Instead, he was charged with the separate crime of using a cell phone in "causing or facilitating" a drug felony. Though petitioner points out (Pet. 19) that "aiding and abetting" may be defined as "facilitat[ing]," he cites no authority for the converse proposition that "facilitating," as used in Section 843(b), must be defined narrowly as "aiding and abetting." And, again, he does not discuss the "causing" prong of the statute at all.[2]

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[2] Petitioner argues (Pet. 19-20) that *Rewis* v. *United States*, 401 U.S. 808 (1971), supports his interpretation of "facilitate," but his reliance on that case is misplaced. In *Rewis*, this Court noted that the Travel Act, 18 U.S.C. 1952, "prohibits interstate travel with the intent to 'promote, manage, establish, carry on, or facilitate' certain kinds of illegal activity." 401 U.S. at 811 (quoting 18 U.S.C. 1952(a)(3)). The Court concluded that "the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." *Ibid.* In *Rewis*, the meaning of the term "facilitate" depended in large measure on the terms surrounding it ("promote, man-

Petitioner further contends (Pet. 20-21) that the canon against surplusage supports his construction of the statute. Just the opposite is true: carving out an atextual exception for those "who use[] a telephone to purchase drugs for personal use" (Pet. 18) would denude Section 843(b) of practical effect. Under petitioner's construction, the statute apparently would cover only drug dealers and third parties who, though not themselves dealers, put the dealers in touch with potential buyers. But such persons are already subject to more stringent penalties than Section 843(b)'s four-year maximum: dealers face up to 20 years under 21 U.S.C. 841(a)(1), and third-party middlemen potentially face the same penalty under the aiding-and-abetting and conspiracy statutes. See 18 U.S.C. 2; 21 U.S.C. 846. For instance, in *United States* v. *Small*, 423 F.3d 1164 (10th Cir. 2005), cert. denied, 546 U.S. 1155, 546 U.S. 1190, and 547 U.S. 1141 (2006)—a case petitioner cites (Pet. 11-12)—one of the defendants, Jones, used a telephone to put his girlfriend, Drew, in touch with a cocaine dealer so that Drew could sell some cocaine and give Jones some of the proceeds. 423 F.3d at 1185. Jones was convicted for aiding and abetting cocaine distribution under Section 841(a)(1) *and* for facilitating the distribution under Section 843(b), and he was ultimately

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age, establish, carry on"), all of which are more restrictive than "caus[e]," the term that appears next to "facilitate" in Section 843(b) and that gives "facilitate" a different meaning than it has in the Travel Act context. See *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008) (noting that the ordinary meaning of a particular statutory term may be broadened or narrowed "by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated"). Petitioner elides the distinction in the two statutory contexts by ignoring the "causing" prong of Section 843(b).

sentenced to concurrent prison terms of 140 months for aiding and abetting and the maximum of 48 months for the Section 843(b) violation. *Id.* at 1171-1172. It is difficult to imagine that Congress, in enacting the CSA in 1970, went out of its way to retain the communication-facility restriction—which had previously been part of Title 18, see 18 U.S.C. 1403(a) (1964) (repealed 1970)—only to make it all but superfluous, relegated to a role as a statutory backstop for the newly-enacted Sections 841(a)(1) and 846. See *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007) ("It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render [an] entire provision a nullity.").

Moreover, petitioner's proposed exception would be difficult to administer, because it is not always clear at the time a defendant sets up a drug transaction whether the purchase will be for further distribution or personal consumption. To take another example from *Small*, Jones's girlfriend, Drew, *did* obtain the cocaine from the dealer, but she ultimately consumed it herself instead of selling it and giving the proceeds to Jones. 423 F.3d at 1185. The use of a telephone to facilitate the distributor's intended dispensing of cocaine to some unknown third party was a crime at the time of the call. It would defy common sense to hold—and the Tenth Circuit indeed declined to hold—that Drew could later undo the offense under Section 843(b) by simply consuming the cocaine, an act that would make her and Jones no less blameworthy under any reasonable reading of the statute.

In short, the court below was right to conclude that, under the statute's plain terms, it is "irrelevant" what a defendant does with cocaine after he facilitates its distri-

bution, because "the crime is complete long before [he] either use[s] or dispose[s] of the cocaine." Pet. App. 12a (quoting *United States* v. *Kozinksi*, 16 F.3d 795, 807 (7th Cir. 1994)). Adopting petitioner's contrary construction would give facilitators a perverse incentive to consume narcotics in an effort to evade additional punishment. The court of appeals properly declined to endorse that anomalous interpretation.[3]

b. Because the language of Section 843(b) is clear, there is no basis for recourse to the legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). In any event, petitioner's argument (Pet. 23-24) based on the legislative history is unpersuasive. Contrary to petitioner's suggestion (Pet. 24), the court of appeals did not hold that Section 843(b) prohibits "the facilitation of drug misdemeanors." The issue instead is whether Congress meant to give a free pass to those who facilitate a *felony* distribution when they are on the receiving end rather than the supplying end, or are serving as a middle man. Section 843(b)'s limited legislative history discloses no such intent to undermine Congress's "comprehensive regime to combat the * * * traffic in illicit drugs." *Gonzales* v. *Raich*, 545 U.S. 1, 12 (2006); cf. *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975) (Though Congress deleted language about

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[3] Given the plain language of the statute and the common meanings of "caus[e]" and "facilitat[e]," petitioner is mistaken in invoking the rule of lenity (Pet. 24-25). The rule applies only in cases of "grievous ambiguity," which Section 843(b) does not contain. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)).

conspiracy in carrying over 18 U.S.C. 1403(a) (1964) into Section 843(b), it did not "intend[] to carve conspiracy out of" the provision, because the 1970 legislation "sought to strengthen existing law enforcement authority in the field of drug abuse, not weaken it."), cert. denied, 425 U.S. 971 (1976).

Had Congress meant to fashion an exception for those who cause or facilitate a felony distribution of drugs to themselves as opposed to someone else, it could have done so explicitly, but it did not. The omission is telling, especially because, as petitioner does not dispute, Section 843(b) plainly does cover a defendant's use of a communication facility to buy a personal-use amount of drugs where the defendant's simple possession is itself a felony—for example, because the defendant possesses cocaine base, or because he has prior drug convictions. 21 U.S.C. 844(a); see *United States* v. *Williams*, 176 F.3d 714, 716-717 & n.3 (3d Cir. 1999) (Alito, J.) (observing that "a defendant could be convicted under [Section] 843(b)" even in a case of "mere possession," and noting the "example" of where, under Section 844(a), the defendant commits a felony by possessing a controlled substance "after a prior conviction").

Petitioner emphasizes (Pet. 21) that in enacting the CSA, "Congress intended to draw a sharp distinction between distributors and simple possessors." Pet. 21 (quoting *United States* v. *Martin*, 599 F.2d 880, 889 (9th Cir.), cert. denied, 441 U.S. 962 (1979)). That is true but beside the point. The distinction is embodied in Sections 841 and 844, which respectively prohibit distribution and possession. But the distinction is immaterial under the text of Section 843(b), which prohibits neither distribution nor possession as such but instead proscribes a third and wholly separate category of conduct: using a

communication facility in causing or facilitating a drug felony. The House Report and the floor statement on which petitioner relies (Pet. 24) do not aid him, because they relate only to the distribution-possession dichotomy of Sections 841 and 844, not to causation or facilitation under Section 843(b). See H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 11 (1970); see also *id.* at 46, 48-49 (distinguishing possession with intent to distribute under Section 841 from "possession for one's own use," under Section 844); 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland) (discussing Section 844).

2. Petitioner argues (Pet. 8-13) that a conflict among the courts of appeals in the interpretation of Section 843(b) warrants this Court's intervention. Petitioner overstates both the extent of the conflict and the necessity of this Court's immediate review.

a. As petitioner observes (Pet. 8-10), the decision below is fully consistent with the Seventh Circuit's decisions on the same issue. In *United States* v. *Binkley*, 903 F.2d 1130 (1990), the court found sufficient evidence to sustain the defendant's conviction under Section 843(b), where the defendant used a telephone to arrange with a drug dealer a purchase of cocaine for the defendant's own personal consumption. *Id.* at 1135-1136. Giving the term "facilitate" its "ordinary meaning" of "to make easier," the court reasoned that the defendant's use of his telephone to arrange the purchase made the dealer's distribution easier and that the defendant's "subsequent treatment of the cocaine cannot retroactively diminish [his] previous facilitation of [the] cocaine sale." *Ibid.* (quoting *United States* v. *McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984)). The court reaffirmed that conclusion in *Kozinski*. See 16 F.3d at 807

("Under the clear terms of the statute a person who uses a telephone to assist the distribution of cocaine, and then consumes the cocaine is as culpable as the one who uses the telephone to assist the distribution, and then gives the cocaine to another to consume.").

b. Contrary to petitioner's contentions (Pet. 10-12), the decision below does not conflict with decisions of the Sixth and Ninth Circuits. In *United States* v. *Van Buren*, 804 F.2d 888 (1986), the Sixth Circuit held that "evidence of the purchase [by telephone] of cocaine for personal use does not establish use of the telephone to further [a drug distribution] *conspiracy*." *Id.* at 892 (emphasis added). The Ninth Circuit in *Martin*, 599 F.2d 880, reached a similar conclusion, again in the conspiracy context. *Id.* at 888-889. For reasons already discussed, arranging a drug transaction by cell phone "makes easier" the seller's distribution as to that same transaction, such that personal-use purchases like the one in this case fall within the ambit of Section 843(b). By contrast, it is not clear as a linguistic matter whether or how a personal-use purchase like the one here, or in *Van Buren* or *Martin*, can "caus[e]," "facilitat[e]," or have any other bearing on a conspiratorial *agreement* to which the defendant is not a party. See *id.* at 888 (the evidence did "not support a finding that [the Section 843(b) defendant] knew of the existence of the conspiracy to distribute"); *Van Buren*, 804 F.2d at 891-892 (in accepting the defendant's guilty plea, the district court "did not establish by means of an inquiry directed to [the] defendant a factual basis" for believing that the defendant "kn[e]w of the conspiracy").

It is therefore an open question how the Sixth Circuit or the Ninth Circuit would rule if presented with facts similar to those presented in the court below. The Sixth

Circuit has elsewhere indicated that, if anything, it may be inclined to reach the same result as the court below did. Before *Van Buren*, the court stated in dicta that "[i]t is sufficient if a defendant's use of a telephone to facilitate the possession or distribution of controlled substances facilitates either *his own* or another person's possession or distribution." *McLernon*, 746 F.2d at 1106 (emphasis added) (quoting *United States* v. *Phillips*, 664 F.2d 971, 1032 (5th Cir. 1981), cert. denied, 457 U.S. 1136, and 459 U.S. 906 (1982)). See Pet. App. 10a (rejecting petitioner's reliance on *Van Buren* and distinguishing *McLernon*). It is true that language in *Martin* suggests that the Ninth Circuit, for its part, might reach a different conclusion than the court below did. See 599 F.2d at 888-889. But the Ninth Circuit has never squarely faced the issue presented here, whether before or in the 30 years since *Martin*.[4]

c. Petitioner is correct that the decision below conflicts with *Baggett*, 890 F.2d 1095, but the conflict with that single decision does not warrant further review in this case. In *Baggett*, the Tenth Circuit emphasized that Section 843(b) prohibits the use of a communication facility "in causing or facilitating * * * a *felony*" and concluded that the statute did not cover the defendant's use of a telephone to order heroin for personal consumption because "illegal possession of controlled drugs by an individual for [her] own use is a *misdemeanor*."

---

[4] Petitioner cites (Pet. 11) *United States* v. *Brown*, 761 F.2d 1272 (9th Cir. 1985), but the court did not confront the issue in that case. And the court actually held that the district court properly *declined* to give a proposed defense instruction stating that "a person who uses the telephone to order 'small amounts of cocaine for his and others' personal consumption' cannot be convicted under [Section] 843(b)." *Id.* at 1278.

Id. at 1097 (citation omitted). Contrary to petitioner's suggestion (Pet. 11, 13) that the Tenth Circuit has "reaffirmed" *Baggett*, the court has not directly confronted the issue presented there in the 19 years since, a fact that itself suggests the issue is not pressing.

In any event, there is at least some reason to believe that, if faced with the issue again, the Tenth Circuit might revisit the rationale in *Baggett*, particularly in view of the Seventh Circuit's intervening decisions in Binkley and *Kozinski* and the Fourth Circuit's decision in this case. The two crucial components of the reasoning in *Binkley*, *Kozinski*, and the decision below were (1) that the "ordinary meaning" of "facilitate" is "to make easier," and there can be no doubt that a purchase for personal use "make[s] easier" the dealer's felony drug distribution, *Binkley*, 903 F.2d at 1135 (quoting *McLernon*, 746 F.2d at 1106); see *Kozinski*, 16 F.3d at 807; Pet. App. 11a; and (2) that Section 843(b) "does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated," Pet. App. 11a; see *Binkley*, 903 F.2d at 1136.

The Tenth Circuit, even in *Baggett*, has never questioned the first of those propositions. 890 F.2d at 1097 (acknowledging that it "may be true" that drug buyers "assist in the distribution or sale" of drugs by buying them and arranging the logistics of their delivery, and that dealers "would go out of business" but for such purchases and assistance) (citation omitted); see *Small*, 423 F.3d at 1185-1186 (though defendant Jones did not himself distribute drugs to his girlfriend Drew, his use of a telephone "resulted in [a dealer] giving * * * cocaine to Drew," such that Jones's conduct "facilitate[d]" distribution and fell within Section 843(b)).

The court in *Baggett* did apparently reject the second proposition underlying *Binkley*, *Kozinski*, and the decision below—*i.e.*, that under Section 843(b), it "does not [matter] *whose* felony must be at issue, just that 'a' felony must be facilitated." Pet. App. 11a; see *Baggett*, 890 F.2d at 1097 (concluding that, because "illegal possession of controlled drugs by an individual for [her] own use is a *misdemeanor*," a buyer for personal use necessarily cannot violate Section 843(b), which prohibits only the facilitation of "a *felony*"). Before *Baggett*, however, the Tenth Circuit in *United States* v. *Watson*, 594 F.2d 1330, cert. denied, 444 U.S. 840 (1979), made clear that it is sufficient for Section 843(b)'s purposes if a defendant facilitates *another person's* drug felony. *Id.* at 1342-1343 & n.14 ("[W]hen [the] defendants used the telephone and contacted [the dealer], they * * * facilitated his unlawful possession with intent to distribute."). And after *Baggett*, the court held in *Small* that the defendant, Jones, "facilitate[d]" his girlfriend's felony possession—by putting her in contact with a dealer— even though Jones was not himself a felony distributor. 423 F.3d at 1185-1186.

The logical tension among the Tenth Circuit's cases may lead that court, if presented with the opportunity, to harmonize its case law in favor of *Binkley*, *Kozinski*, and the decision below. Given the infrequency with which the issue has directly arisen both in the Tenth Circuit and elsewhere, there is no pressing need for this Court's intervention in the interim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008

REPLY BRIEF

109

Supreme Court, U.S.
FILED
OCT 2 8 2008
OFFICE OF THE CLERK

No. 08-192

IN THE
Supreme Court of the United States

SALMAN KHADE ABUELHAWA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The purchase of drugs for personal use constitutes only a misdemeanor. The government submits, however, that the misdemeanor becomes transformed into a felony whenever—as is utterly commonplace—the parties exchange a cellular phone call, e-mail, or text message about the transaction rather than conduct it entirely face-to-face. While two circuits now endorse that counterintuitive view, at least two circuits squarely reject it. The government makes no effort whatsoever to deny that its view converts virtually *any* misdemeanor drug purchase into a felony, or that the question presented therefore is of profound significance to the administration of the federal drug laws—particularly given the ever-increasing use of cellular telephones, e-mails, and text messages in drug transactions. The government also concedes the existence of a circuit conflict. And while the government attempts to raise questions about the conflict's scope and durability, those efforts are baseless: it is simply indisputable that the circuits are divided at least 2-2 on the issue, and that the conflict is firmly entrenched.

Rather than deny the sweeping implications of its view or the presence of a circuit conflict, the government principally contends that the decision below is correct. Br. in Opp. 5-12. The government's merits-based defense affords no basis for denying review, and in any event is wholly unpersuasive. Congress drew a fundamental distinction in the federal drug laws between misdemeanant users and felon distributors, and the decision below obliterates that distinction. This Court's review is warranted.

A. There is an entrenched circuit conflict on whether the use of a communications facility to buy drugs solely for personal use violates 21 U.S.C. § 843(b). In certain circuits, a drug user who makes a phone call to buy drugs commits a felony. In other circuits, the drug user would commit only a misdemeanor, and may avoid any conviction at all, 18 U.S.C. § 3607. That intolerable disparity in treatment warrants review.

1. The government concedes the circuit conflict, but contends that the Tenth Circuit stands alone in rejecting the Fourth and Seventh Circuits' support of its interpretation of Section 843(b). Br. in Opp. 13-16. It is clear, however, that at least the Ninth Circuit joins the Tenth Circuit in rejecting the government's reading of Section 843(b). The government suggests that the Ninth Circuit has held that the use of a communications device to purchase drugs for personal use fails to facilitate a *conspiracy* to distribute drugs, but has not conclusively settled whether it facilitates *distribution* itself. Br. in Opp. 13. Two controlling Ninth Circuit decisions, however, squarely resolve the latter issue.

In *United States v. Martin*, 599 F.2d 880 (9th Cir. 1979), the Ninth Circuit held that a "mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress" in Section 843(b). *Id.* at 889. The court explained that, "[t]o hold that persons who merely buy drugs for their personal use are on equal footing with distributors by virtue of the facilitation statute would undermine th[e] statutory distinction" between "distributors and simple possessors." *Id.* Although the personal-use buyer had been charged with facilitating his dealer's conspiracy rather than

his dealer's distribution, *not one word* in *Martin* suggests that distinction could matter. To the contrary, the court explicitly rejected "the government's position that the *distribution* of drugs *or an agreement* to distribute drugs is 'facilitated' by a purchaser of the drugs." *Id.* at 888 (emphasis added). The court held that, as long as a person "merely buy[s] drugs for . . . personal use," he falls outside Section 843(b). *Id.* at 889.

Not surprisingly, other courts of appeals to address that issue correctly read *Martin* to hold that the Section 843(b) fails to encompass purchases for personal use. Pet. App. 9a (*Martin* "find[s] that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated"); *United States v. Binkley*, 903 F.2d 1130, 1135 (7th Cir. 1990) (*Martin* "held that the purchase of cocaine for one's own use does not violate § 843(b)"); *United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1990) (*Martin* "held that one guilty of only a misdemeanor cannot be convicted under § 843(b)"). Indeed, the government itself described *Martin* in its brief below as having "held that the purchase of drugs for personal use did not violate [Section] 843(b)." Gov't C.A. Br. 24. The government's attempt to confine *Martin* to the conspiracy context is untenable.

The government asserts that the Ninth Circuit has not confronted "the issue presented here . . . in the 30 years since *Martin*." Br. in Opp. 14. But that is because *Martin* firmly resolved the issue against the government, preventing the government from thereafter applying Section 843(b) to a personal-use buyer in that circuit. In any event, the Ninth Circuit *has* confronted the issue since *Martin*, albeit when it

was raised by a defendant rather than the government.

In particular, in *United States v. Brown*, 761 F.2d 1272 (9th Cir. 1985), the Ninth Circuit again held that Section 843(b) fails to reach purchases for use. Brown, who had been convicted under Section 843(b) of facilitating distribution to third parties, claimed entitlement to a lesser-included offense instruction asking whether he used a telephone to order "cocaine for . . . personal consumption." *Id.* at 1278. The Ninth Circuit disagreed, holding that "use of a telephone to order cocaine for personal use is . . . not a lesser-included offense; indeed, it is no offense at all." *Id.* "Section 843(b) condemns the use of a telephone in facilitating the commission of certain felonies," but the "[p]ossession of cocaine for personal use is only a misdemeanor." *Id.* The court's rejection of Brown's lesser-included offense instruction thus necessarily turned on its holding that Section 843(b) fails to encompass the purchase of drugs for personal use. The government plainly errs in contending (Br. in Opp. 14 n.4) that *Brown* failed to confront that issue.

While the Ninth Circuit has (twice) squarely resolved the issue, it is a closer question whether the Sixth Circuit did so in *United States v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) (per curiam). Significantly, the Tenth Circuit in *Baggett*, 890 F.2d at 1097-98—which the government agrees held Section 843(b) inapplicable to purchases for personal use—regarded itself as "agree[ing] with" the Sixth Circuit's decision in *Van Buren*. But whether the circuits ultimately are divided 3-2 or 2-2, the disagreement merits review.

2. Although conceding that the decision below conflicts with *Baggett*, the government suggests (Br. in Opp. 16) that the Tenth Circuit might revisit *Baggett* in light of the decision's supposed tension with *United States v. Watson*, 594 F.2d 1330 (10th Cir. 1979), and *United States v. Small*, 423 F.3d 1164 (10th Cir. 2005). That suggestion is remarkable—and thoroughly baseless—because the Tenth Circuit already has *expressly* reconciled *Baggett* with both *Wilson* and *Small*.

In *Baggett* itself, the government argued that *Wilson* supported application of Section 843(b) to a purchaser for personal use. Rejecting that argument, the court explained that *Watson* had "upheld a conviction for use of a telephone to facilitate distribution of narcotics, but only after concluding that 'there was proof that the appellants, *as street dealers*, were using the telephone to obtain [drugs] *for resale*.'" 890 F.2d at 1098 (emphasis in *Baggett*) (quoting *Watson*, 594 F.3d at 1343). Because "*Watson* involved defendants whose underlying crime was a felony, not a misdemeanor, . . . it bears little relation to the present case," *i.e.*, *Baggett*. *Id.*

The Tenth Circuit likewise has explicitly reconciled *Baggett* and *Small*. In *Small*, Jones encouraged a dealer to distribute more than five grams of crack cocaine to a third party for resale, but the third party consumed the drugs. Jones argued that, because the third party used the drugs, *Baggett* precluded his conviction under Section 843(b). The court disagreed, explaining that "the holding in *Baggett* . . . was predicated on the fact that the drug possession facilitated in that case" was a "misdemeanor." *Small*, 423 F.3d at 1186. "In contrast, possession of more than five grams of crack cocaine

is . . . a drug felony." *Id.*; *see* 21 U.S.C. § 844(a) (excepting possession of five more grams of crack cocaine from general rule that possession for use is misdemeanor). *Small* thus not only harmonized its holding with *Baggett*, but also expressly reaffirmed *Baggett*. *Baggett*, in short, is firmly entrenched in the Tenth Circuit, confirming that there is at least a 2-2 conflict on the question presented.

B. Because the interpretation of Section 843(b) adopted below—and pressed by the government—dramatically expands the federal drug laws, the question presented is highly important. The decision below converts the misdemeanor purchase of drugs for personal use into a felony anytime the buyer uses a communications device. It thus has the sweeping effect of transforming virtually *any* misdemeanant user into a felon. Any high school student who text messages another student requesting a small quantity of drugs for use would commit a felony, even though the same student who makes the same request face-to-face would commit only a misdemeanor. NACDL Br. 9-10. And if the student sends four messages in connection with a single request, he would face four felony counts and up to 16 years of imprisonment. Pet. 16.

The government makes no effort to deny the sweeping implications of the decision below for the federal drug laws. Rather, the government affirms its full support of prosecuting as a felon any user who makes a phone call in obtaining drugs for use. Indeed, the government goes as far as to embrace the position that, unless it can continue to apply Section 843(b) against buyers for personal use, the statute would we be "denude[d]" of any "practical effect" and rendered "all but superfluous." Br. in Opp. 8-9.

There could be no clearer confirmation of the significance of the question presented than the government's considered view that it *must* prosecute drug users as felons under Section 843(b) to preserve the provision's practical significance.

What is more, as the Center on the Administration of Criminal Law (Center) explains, the Department of Justice's charging policy directs prosecutors to "charge and pursue the most serious, readily provable offense . . . supported by the facts." Center Br. 17-18 (internal quotation marks omitted). That governing policy would require the government to charge as a felon virtually every person who obtains a small quantity of drugs for personal use. The government also does not deny that its interpretation dramatically affects plea bargaining in drug cases, giving prosecutors extraordinary—and unwarranted—leverage in plea negotiations. Center Br. 19-21; NACDL Br. 7-8; Pet. 15.

The government's sole argument against the need for this Court's review instead is its inexplicable suggestion that supposed tension in the Tenth Circuit's decisions could lead that court to come into line with the Fourth and Seventh Circuits. Br. in Opp. 16. That argument is baseless for the reasons explained, and the government's silence otherwise concerning the sweeping effect of its views on the Nation's drug laws only fortifies the need for review.

C. The government's principal argument for denying review is that the Fourth Circuit correctly decided the merits. Br. in Opp. 5-12. Even assuming the government's merits-based arguments afforded a basis for denying review, its arguments are wholly unpersuasive.

Relying on a dictionary definition of "facilitate," the government contends that use of a communications device to purchase drugs for personal use facilitates a "felony" within the meaning of Section 843(b). Br. in Opp. 6-7. But the purchase of drugs for personal use is a misdemeanor, not a "felony." In the government's view, the use of a phone to facilitate a misdemeanor purchase for personal use simultaneously facilitates the dealer's felonious sale. That rationale, however, conflicts with three overriding considerations that establish the inapplicability of Section 843(b) in the circumstances of this case.

1. First, it is an established principle, reflected in the Model Penal Code (MPC) that "a person is not an accomplice in an offense committed by another person if . . . the offense is so defined that his conduct is inevitably incident to its commission." MPC § 2.06. A "purchaser [thus] is not a party to the crime of illegal sale." 2 Wayne R. LaFave, Substantive Criminal Law, § 13.3(e), at 371 (2d ed. 2003). Accordingly, the same principle that bars the government from treating a purchaser of drugs for personal use as an aider and abettor of the distribution to himself, *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977), also bars the government from treating the drug user as a "facilitator" of the "felony" of distribution to himself under Section 843(b).

Indeed, the definition of "aid and abet" is "to facilitate." Black's Law Dictionary 76 (8th ed. 2004). The Government's sole response is that, while "aid or abet" may mean "facilitate," "facilitate" does not necessarily mean "aid or abet." Br. in Opp. 7. But a definition does not run in only one direction; it is a statement of equivalence. Consequently, just as buyers of drugs for personal use may not be con-

victed of aiding and abetting a distribution under 18 U.S.C. § 2, they also may not be convicted of facilitating a distribution under Section 843(b).

2. That conclusion comports with the firm distinction drawn by Congress in the federal drug laws between drug dealers and drug users. Congress made drug dealing a felony but made possession for personal use a misdemeanor, reflecting a determination that rehabilitation presents the preferred means of addressing drug use and addiction. Pet. 21; NACDL Br. 11-12, 14-16. The government's interpretation of Section 843(b) would obliterate Congress's approach to drug use, exposing virtually every drug user to a felony prosecution and four years of imprisonment.

The government dismisses that consequence as "immaterial" to the proper construction of Section 843(b). Br. in Opp. 11. It is a fundamental rule of statutory construction, however, that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The government's interpretation transgresses that rule by interpreting Section 843(b) in a manner that undermines a central policy reflected in the federal drug statutes.

3. The statutory history confirms that Section 843(b) fails to reach drug purchases for personal use. At the same time Congress amended the federal drug laws to make possession for personal use a misdemeanor, it simultaneously—in the neighboring provision—narrowed the prohibition against facilitation of a drug "offense" to facilitation of a drug "felony." Pet. 23-24. Those simultaneous changes re-

flect Congress's coordinated intention to downgrade the personal use of drugs to a misdemeanor, and to exempt misdemeanor drug users from treatment as a felon under the facilitation statute. Strikingly, the government fails whatsoever to address those coordinated changes, much less propose any alternative explanation.

4. The government's remaining arguments are insubstantial.

a. The government submits that excluding buyers for personal use from Section 843(b) would create difficulties in administration by requiring determination of whether a buyer obtained drugs for personal use or instead for resale. Br. in Opp. 9-10. The drug laws, however, already draw a basic distinction between possession for personal use, 21 U.S.C. § 844(a), and possession with intent to distribute, 21 U.S.C. § 841(b)—entirely without regard to Section 843(b). The government thus routinely must prove that a defendant possessed drugs for resale rather than use whenever it charges possession with intent to distribute, and juries readily make that determination based on considerations such as the quantity of drugs and the defendant's statements. *See Swiderski*, 548 F.2d at 450.

b. The government suggests that a person who purchases drugs for personal use "causes" the seller's felony and therefore violates Section 843(b). Br. in Opp. 6-7. The Fourth Circuit below, however, explicitly grounded its decision solely on the basis that the purchaser of drugs for personal use "facilitates" the seller's "felony." Pet. App. 9a. Because that was the court's sole basis for affirming petitioner's conviction, the case comes to this Court solely as a facilita-

tion case. The other court of appeals to support the application of Section 843(b) to purchases for personal use—the Seventh Circuit, in a decision on which the government heavily relies—likewise based its decision solely on the term "facilitate." *Binkley*, 903 F.2d at 1135-36.

At any rate, the government's reliance on the word "cause" is if anything less persuasive than its reliance on the word "facilitate." Indeed, the government makes no attempt to identify even *a single* argument that could sustain petitioner's conviction on the basis of the word "cause" if the court of appeals' reliance on the word "facilitate" were rejected. Nor could it. The very same arguments that demonstrate that a purchase for personal use fails to "facilitate" a "felony" also show that it fails to "cause" a "felony."

In particular, the background principle that a purchaser is not a party to a seller's offense would preclude liability based on the word "cause" no less than it precludes liability based on "facilitate." Indeed, "cause" liability is simply another form of accessory liability in the aiding and abetting statute. 18 U.S.C. § 2. ("Whoever willfully *causes* an act to be done . . . is punishable as a principal.") (emphasis added). Similarly, reliance on "cause" to support the application of Section 843(b) to personal-use buyers would obliterate Congress's distinction between drug dealers and users no less than reliance on "facilitate." And just as with "facilitate," reliance on "cause" could not be reconciled with the narrowing of Section 843(b) from reaching any drug "offense" to reaching only a drug "felony." Thus, if the Court rejects the government's "facilitate" theory, its "cause"

theory would necessarily fall with it. The government gives no reason to conclude otherwise.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

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October 28, 2008

AMICUS CURIAE BRIEF

105

(2)

No. 08-192

Supreme Court, U.S.
FILED
SEP 15 2008
OFFICE OF THE CLERK

IN THE

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law ("the Center") is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is the central issue in criminal justice today at all levels of government, there is a dearth of research on how prosecutors exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center is dedicated to identifying the best prosecutorial practices and suggesting avenues of reform. The Center is developing a litigation practice that aims to use its empirical research and experience with criminal justice and prosecution practices to assist in important criminal justice cases at all levels, concentrating on cases in which exercises of prosecutorial discretion raise significant substantive legal issues.

SUMMARY OF ARGUMENT

The Court should grant the petition because the uncertainty surrounding Section 843(b) frustrates the responsible and ethical exercise of prosecutorial discretion and because the statutory

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

context and history provide compelling evidence that Section 843(b) does not – and was never intended to – reach purchasers of drugs for personal use. Section 843(b) is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which draws a sharp distinction between drug distribution, a felony subject to harsh penalties, and personal use of controlled substances, a misdemeanor for which Congress emphasized treatment and rehabilitation, rather than retributive punishment. The lower court's decision fundamentally undermines this pivotal distinction by improperly subjecting purchasers for personal use to harsh penalties reserved for drug traffickers and distributors.

Reading Section 843(b) to reach the drug purchases of simple users like Petitioner also conflicts with the extensive statutory history of Section 843(b), which demonstrates that the provision was intended solely to aid in the apprehension and prosecution of large-scale narcotics traffickers and distributors, whose use of the telephone enabled them to evade the law by avoiding contact with the ultimate buyer. Because buyers, on the other hand, could be more easily observed, apprehended and prosecuted, the extensive legislative record of the communication facility provision contains no reference at all to buyers. The complete statutory history of Section 843(b) – which was not considered by the courts below – thus provides compelling evidence that Congress never intended Section 843(b) to apply to purchasers for personal use.

The issue of whether Section 843(b) reaches purchasers of drugs solely for personal use has wide-

ranging consequences for enforcement of the federal drug laws. Because the telephone and other personal communications devices are a pervasive aspect of modern life and commerce, the lower court's reading of Section 843(b) would transform almost every purchase of drugs for personal use into a felony subject to severe punishment. That reading not only undermines Congress' clear emphasis on lowered penalties and rehabilitation for "simple possession" but, because Department of Justice guidelines direct prosecutors to charge the "most serious" offense applicable to a given case, it will divert prosecutorial resources from the express legislative priority of combating distribution and promotion, and may potentially lead to arbitrary and discriminatory enforcement. Moreover, the lower court's decision will have a staggering impact on the plea bargaining process, giving prosecutors unwarranted leverage to threaten "simple possessors" with lengthy prison sentences, and altering the basic calculus of an accused in deciding whether to proceed to trial.

In sum, the lower court's decision eviscerates the clear statutory distinction between distributors and purchasers, elides the basic concerns that gave rise to Section 843(b) in the first place, and will have a fundamental and unwarranted impact upon the exercise of prosecutorial discretion and the criminal justice process more generally. For these reasons, the Court should grant the petition for certiorari.

ARGUMENT

I. The Split Among the Courts of Appeals Leaves Prosecutors Without Guidance In Applying Section 843(b) and Creates A Vast Disparity In Prosecutions For Drug Possession.

Although the courts are the ultimate arbiters of a statute's meaning, prosecutors are called on daily to interpret the law and determine whether particular conduct falls within a statute's scope. *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The Justice Department, of course, has a very specific responsibility to determine for itself what [a] statute means, in order to decide when to prosecute . . . ."); *see also Wagner Seed Co. v. Bush*, 946 F.2d 918, 926 (D.C. Cir. 1991).

This Court has previously recognized that prosecutorial "discretion is an integral feature of the criminal justice system," *United States v. Labonte*, 520 U.S. 751, 762 (1997), and to this end, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) (internal quotations omitted). This discretion is predicated not only on the assumption that prosecutors will fulfill their ethical duty to "seek justice," *Young v. United States*, 481 U.S. 787, 803 (1987) (quoting Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association (ABA)

Model Code of Professional Responsibility (1982)), but also on the notion that the laws they seek to enforce are clear and consistently interpreted. *Cf. McNally v. United States*, 483 U.S. 350, 360 (1987) (declining to "construe [a criminal] statute in a manner that leaves its outer boundaries ambiguous . . . .") (*superseded by statute on other grounds*). For prosecutors to fulfill their legal and ethical mandate to pursue justice, the laws they are entrusted to enforce must be clearly defined and consistently applied. This Court should therefore grant the petition in order to provide prosecutors with clearer guidance on the critically important question of whether to charge certain conduct as a felony or as a misdemeanor.

There is an additional yet related reason that prosecutors – and the public – would benefit from this Court's resolution of the legal issues presented by the petition. As a result of the split among the courts of appeals regarding Section 843(b), possessors are subject to misdemeanor charges and maximum one-year sentences in some jurisdictions, and felony charges and four-year sentences in others. Equally importantly, more than half of the courts of appeal have provided *no* guidance to prosecutors and the public within their jurisdictions. The combined effect of the competing interpretations among some courts of appeals, and the lack of interpretations from others, undermines the congressionally-mandated "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Indeed, under the present regime, two individuals with *identical* records who are found guilty under federal law of *identical*

conduct could, depending on where in the country they reside, face substantially different charges and sentences. The Court should grant the petition in order to eliminate these disparities and ensure consistent treatment between similarly-situated defendants.

II. Permitting Prosecutors to Charge Possessors Under Section 843(b) Is At Odds With The Structure of The Federal Drug Laws.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citation omitted). Section 843(b) is part of a carefully designed drug enforcement scheme, in which Congress drew a sharp distinction between drug distribution, subject to severe punishment, and "simple possession," for which the Act emphasizes rehabilitation and leniency. This statutory structure compels the conclusion that Section 843(b) was never intended to apply to purchasers of drugs solely for personal use.

Prior to 1970, the mere purchase or possession of drugs in small amounts for personal use could result in a felony conviction and harsh penalties. *See, e.g.*, Internal Revenue Code of 1954, Pub. L. No. 591 ch. 736 § 4704(a), 68A Stat. 550 (originally codified at 26 U.S.C. § 4704(a)); Narcotic Drugs Import and Export Act of 1909 ch. 100 § 2, Pub. L.

No. 221, 35 Stat 614 (originally codified at 21 U.S.C. § 174) (all repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 §§ 101(a)(2), (b)(3)(A), 84 Stat. 1236, 1291-92). Under this pre-1970 regime, small-time drug users were lumped together with narcotics traffickers and large-scale drug distributors; both could be convicted of felonies and punished severely.

In order to treat drug possessors less harshly, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Act"), which "draws a sharp distinction between drug offenses of a commercial nature and illicit personal use of controlled substances." *United States v. Swiderski*, 548 F.2d 445, 449 (2d Cir. 1977); *see also United States v. Martin, 599 F.2d 880, 889 (9th Cir. 1979)* (noting that "[t]he scheme of the Act shows that Congress intended to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties.").

To implement this pivotal policy distinction between distribution and personal drug use, the Act makes drug distribution a felony, punishable by a *minimum* five to ten years imprisonment and a maximum of fifteen years imprisonment, 21 U.S.C. § 841, while "simple possession" is a misdemeanor, punishable by not more than one year imprisonment. 21 U.S.C. § 844; *see also id.* ("First offenders convicted of simple possession may receive a conditional discharge . . . and upon fulfillment of any terms and conditions the court might impose, their record will be expunged"). This disparity in punishment reflects an unmistakable congressional

determination that drug distribution is a far greater evil than "simple possession," and a clear statutory purpose to treat distributors much more harshly than those who purchase drugs for personal use.

Applying Section 843(b) to one who purchases drugs in small quantity for personal use would turn this carefully drawn statutory distinction on its head by subjecting purchasers to penalties *far greater* than the maximum one year term of imprisonment Congress intended for "simple possession." Not only is a violation of Section 843(b) punishable by four years imprisonment – four times the maximum penalty for simple possession – but the statute also provides that "[e]ach separate use of a communication facility shall be a separate offense under this subsection." 21 U.S.C. § 843(b).

Under the lower court's interpretation, a purchaser who, as a matter of pure happenstance, makes several phone calls to arrange a single purchase is guilty – not of a single misdemeanor punishable by one year imprisonment as provided in Section 844 – but of *multiple felonies*, each punishable by *four* years imprisonment. *Id.* Indeed, this case exemplifies how reading Section 843(b) to reach purchasers for personal use is incompatible with treating drug users more leniently than distributors. Petitioner was charged with *seven* counts of violating Section 843(b) for using a telephone to arrange at most *two* meetings to purchase drugs. (JA at 10-15; App. at 17a). Thus, instead of the maximum two years imprisonment he would have faced on two misdemeanor counts of "simple possession" under Section 844, he was

instead subject to seven felony convictions totaling a potential maximum 28 years imprisonment.

Such a result is at war with the clear intent of Congress, as reflected in the text and structure of the Act, which was to moderate the punishment imposed on drug users, and instead focus on treatment and rehabilitation. *See, e.g.,* H.R. Rep. No. 1444 at 10, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4575 ("[T]he rehabilitation of the individual [drug abuser], rather than retributive punishments should be the major objective."); *id.* at 11, 1970 U.S.C.C.A.N. at 4576 ("[P]ossession for personal use . . . involves the least severe penalties of all."); S. Rep. No. 91-613 (1969) at 2 (noting that "the increasingly longer sentences that had been legislated in the past [for drug abuse] had not shown the expected overall reduction in drug law violations"). The Court should therefore grant the petition and clarify that Section 843(b) should be read within the context of the statute in which it is found.

III. The Statutory History Of Section 843(b) Demonstrates That It Was Never Intended To Be Applied To Purchasers Of Drugs For Personal Use.

Section 843(b)'s statutory history further demonstrates that it was directed solely toward drug traffickers and large-scale distributors, and not personal drug users. The communication facility provision was originally enacted – in substantially identical form to Section 843(b) – as part of the Narcotic Control Act of 1956 ("NCA"), Pub. L. No. 84-728 § 1403, 70 Stat. 567 at 573, *repealed by*

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 § 1101(b)(1), 84 Stat. 1236, 1292.[2] The targets of this provision are unmistakable: "*big-time traffickers* [who] are seldom caught and convicted, because . . . [t]heir operations are almost entirely limited to the telephone." S. Rep. No. 84-1997 at 9 (1956) (emphasis added).

Congress has long been concerned with the use of communications facilities by narcotics traffickers and large-scale distributors to evade the law. In the early 1950s – well before Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510 *et seq.*, authorized the use of

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[2] Section 1403 of the Narcotic Control Act of 1956, titled "Use of communications facilities-penalties," stated:

> (a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit [certain enumerated drug felonies] shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.
>
> (b) For purposes of this section, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication.

Pub. L. No. 84-728, § 1403, 70 Stat. 567, 573 (codified at 18 U.S.C. § 1403).

wiretapping in criminal investigations – the inability of prosecutors to obtain admissible evidence against large-scale drug traffickers and distributors was stifling law enforcement efforts to enforce the drug laws. *See* S. Rep. No. 84-1997 (1956). Federal and state law enforcement simply could not obtain convictions of large-scale drug traffickers and distributors whose "operations [were] almost entirely limited to the telephone," and who were therefore able to evade the law by "avoid[ing] all direct contact with the peddlers and ultimate buyers . . . ." *Id.* at 9. To study the problem, Congress convened a Judiciary Subcommittee on Improvements In the Federal Criminal Code, *see* S. Res. 67, 84th Cong. (1955), chaired by Senator Price Daniel.

After extensive hearings, the Daniel Subcommittee initially proposed to address the problem through a limited wiretapping law, *see* S. 3760, 84th Cong. § 1407 (1956) (titled Narcotic Control Act of 1956), but, when confronted with severe opposition from those concerned with its impact on civil liberties, *see* 102 Cong. Rec. 9,031-9,047, 9,302 (1956), Congress substituted the present "communication facility" provision as a compromise. *See* 102 Cong. Rec. at 9,302 (statement of Senator Wayne Morse) (communication facility provision aimed at "the drug traffic"); *see also United States v. Butler*, 204 F. Supp. 339, 343 (S.D.N.Y. 1962) (noting that the communication facility provision "was inserted *in lieu of* a wiretapping provision originally contained in the bill") (emphasis added).

The communication facility provision, like the previously-proposed wiretapping legislation, was thus enacted not because use of a communication

facility makes facilitation of a drug felony inherently more culpable, but rather to aid law enforcement efforts against large-scale drug traffickers and distributors, who could evade detection and prosecution by conducting their illicit activities entirely by phone:

> Although the telephone is the major means of contact between *top narcotic traffickers*, Federal agencies are not permitted, under any circumstances to intercept and divulge messages between the traffickers even though it might produce evidence which would lead to their arrest and conviction . . . .
>
> As a consequence, the United States Government is unwittingly giving narcotics violators, especially the *large racketeers and wholesalers*, a great advantage over Federal law-enforcement officers in their efforts to keep pace with and stamp out the illicit narcotics traffic.

S. Rep. No. 84-1997 at 9 (emphasis added).

Congress focused on narcotics traffickers and large-scale distributors – rather than personal drug users – because it was the large traffickers and suppliers who were able to evade prosecution through their use of the telephone to conduct their illicit trade while staying at a distance from the drugs. By contrast, the drug-addicted purchaser on the street, who could be visually observed purchasing from his dealer and found to be in actual possession

of the drugs, presented little problem for law enforcement.

Indeed, this focus upon the traffickers and distributors was echoed by the Department of Justice itself. In subcommittee testimony cited in the Senate report, Assistant Attorney General Warren Olney III testified:

> Because of the covert nature of the narcotics traffic wherein the *big supplier* avoids all possible contact with the ultimate buyer and with the petty pusher or peddler, distribution is usually effected through a conspiratorial network through many intermediaries . . . . In making these arrangements, the telephone is an essential tool which lends itself to clandestine operation . . . .

S. Rep. No. 84-1997 at 9 (emphasis added).

Judge J. Edward Lumbard likewise told the subcommittee that the inability to target large-scale drug distributors through their use of the telephone put law enforcement at a severe disadvantage:

> The narcotics traffic is run by *people who operate on an international scale*, and in this country on an interstate scale. They are *professional criminals*. They have lots of money. They have powerful allies. They have expert knowledge as to how to evade the law and to escape detection. *They are not*

> *themselves addicts. In fact, they seldom handle any drugs . . . .*
>
> Now to get evidence sufficient to convict a *big operator*, as you can see, is very difficult at best. We are dealing with people who operate secretly. They have at their disposal all of the means of modern science and invention and transportation. They use the telephone extensively, and it helps to conceal their identity.

S. Rep. No. 84-1997 at 10 (emphases added).

The NCA's communication facility provision was re-enacted as Section 843(b) fourteen years later and, because there was neither an intent nor effort to change its substance, there is very little contemporaneous statutory history. *See, e.g., United States v. Pierorazio*, 578 F.2d 48, 51 (3d Cir. 1978) (noting the sparse history of Section 843(b)); *see also* S. Rep. No. 91-613, at 3 (explaining that one of the Act's main purposes was to simply "collect the diverse drug control and enforcement laws under one piece of legislation" as a follow-up to the reorganization of drug control agencies carried out under the Johnson Administration in 1968); Drug Abuse Control Amendments – 1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the H. Comm. on Interstate and Foreign Commerce, 81st Cong. 709 (1970) ("[T]his [communication facility provision] is the exact law that is on the books presently . . . . We are trying to codify that law, pull it out of title 18 and put it in this law. *All this is cosmetic.*") (statement

of Michael Sonnenreich, Deputy Chief Counsel, Bureau of Narcotics and Dangerous Drugs, Department of Justice) (emphasis added).

Congressional silence upon reenacting the communication facility provision is strong evidence that Congress endorsed and incorporated the provision's prior legislative history into Section 843(b). *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (rejecting statutory construction because "if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it . . ."); *cf. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1541 (2007) (interpreting statutory language consistently with pre-enactment regulations because Congress enacted the legislation "without comment or clarification").

Indeed, there is nothing at all in the history of the Act to suggest that Section 843(b) was intended to apply to drug users. To the contrary, as described above, other provisions of the Act significantly *lowered* the penalties for personal drug use – from felony to misdemeanor status – with a strong legislative emphasis instead upon treatment and rehabilitation. *See* H.R. Rep. No. 1444 at 10, *supra*, 1970 U.S.C.C.A.N. at 4575 ("[T]he rehabilitation of the individual [drug user], rather than retributive punishments should be the major objective."); 21 U.S.C. § 844 ("First offenders convicted of simple possession may receive a conditional discharge . . . and upon fulfillment of any terms and conditions the court might impose, their record will be expunged"). Plainly, the same 1970 Congress that passed the Act did not intend to undermine this important policy by

imposing harsh penalties on users through the back door of the communication facility provision which, as demonstrated above, was never intended to apply to users.

Moreover, use of the telephone by purchasers simply does not present the same concerns that motivated Section 843(b). Unlike the large-scale distributors for whom Section 843(b) was intended, purchasers can, without difficulty, be observed handling drugs, searched and then prosecuted based upon physical evidence recovered from their person. And Congress would not have intended to give prosecutors the leverage of felony charges against buyers to induce buyers to cooperate in the government's effort to disrupt the distribution networks targeted by the communication facilities statute. Buyers and addicts are typically less equipped than sellers to aid the government in investigating drug distribution networks and prosecuting high-level distributors because buyers do not interact with individuals high on the distribution chain. *See supra*, S. Rep. No. 84-1997 at 9-10. Section 843(b) was and remains an unnecessary and unwarranted device in the prosecution of purchasers for personal use.

This statutory history conclusively demonstrates that the communication facility provision – first enacted in the NCA and later copied almost verbatim into Section 843(b) of the Act – was intended solely to target large-scale drug traffickers. It was specifically those traffickers and distributors whose use of telephonic communications enabled them to avoid prosecution and detection and it was that challenge to law enforcement that the

communication facility provision was enacted to address. Because Congress did not intend for Section 843(b) to apply to purchasers of drugs for personal use and because such application is at odds with the structure of the statute as a whole, the Court should grant the petition and reverse the lower court's ruling to the contrary.

IV. The Lower Court's Decision Will Affect Nearly Every Prosecution For Drug Possession And Give Prosecutors Power In Excess Of That Intended By The Statute.

The lower court's decision – which, as demonstrated by the context and history of Section 843(b), incorrectly makes available to prosecutors a felony charge not provided for by Congress – has wide-ranging implications for both the exercise of prosecutorial discretion and the public at large. This Court should grant the petition, so as to provide guidance and uniformity regarding both the types of criminal cases that may be brought against possessors, and how those cases are resolved.

A. The Lower Court's Decision, In Combination With Department of Justice Charging Policy, Will Eviscerate The Statutory Distinction Between Sellers And Buyers And May Lead To Arbitrary And Discriminatory Enforcement.

The Department of Justice's charging policy directs prosecutors, *inter alia*, to "charge and pursue the most serious, readily provable offense or offenses

that are supported by the facts of the case . . . ." Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors at 2 (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm. This policy is firm and well established and, if applied rigidly, requires a federal prosecutor seeking to charge something other than the most serious, readily provable offense to both demonstrate that the case falls within one of a handful of "Limited Exceptions," *id.*,[3] and to obtain approval from an Assistant Attorney General, United States Attorney, or designated supervisory attorney.

As of 2006, there were in excess of 233,000,000 cellular telephone subscribers in the United States. U.S. Census Bureau, *Statistical Abstract of the United States*, t. 1120 (2008), *available at* http://www.census.gov/compendia/statab/2008edition.html. Given the proliferation of cellular telephones and other "communication facilit[ies]" since the enactment of Section 843(b), virtually every possessor will, in connection with his or her purchase of the drugs (as well in virtually all other aspects of life), use some type of communication facility. Thus, notwithstanding the firm line Congress drew between drug possessors and distributors, *see Section II, supra*, the Department of Justice's charging policy will likely cause federal prosecutors to bring felony

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[3] The exceptions are: (1) cases in which the sentence would not be affected; (2) cases subject to "Fast Track" treatment; (3) post-indictment reassessment that the most serious offense is not readily provable; (4) substantial assistance by the defendant; (5) selected circumstances in which a prosecutor need not seek a statutory enhancement; and (6) other rare and exceptional circumstances. *Id.*

charges under Section 843(b) against many simple possessors of illegal narcotics, thereby eviscerating the distinction between such offenders that is embedded in the statute intended by Congress. On the other hand, if the large number of possessors swept within a broadened Section 843(b) leads federal prosecutors to disregard the Ashcroft Memorandum, Section 843(b) may be applied haphazardly, arbitrarily, and possibly discriminatorily. The Court should grant the petition so that it can determine whether the lower court's theory is a proper interpretation of the statute.

B. Prosecutors Will Wield Unwarranted Power in the Plea Bargaining Process.

It is a truism that the overwhelming majority of federal criminal proceedings are resolved via a guilty plea. *Compendium of Federal Justice Statistics, 2004*, U.S. Department of Justice, Office of Justice Programs, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs04.htm (reporting that 96% of convicted defendants in federal criminal proceedings pleaded guilty). In nearly every federal criminal proceeding, then, the plea bargain plays a crucial role in determining the punishment ultimately imposed. *See Wright v. Van Patten*, 552 U.S. __, 128 S. Ct. 743, 748 (2008) (Stevens, J. concurring) (acknowledging that "plea bargaining [is] the norm and trial the exception").

It is a well recognized fact that plea bargaining does not occur in a vacuum, but instead "takes place in the shadow of (*i.e.*, with an eye

toward the hypothetical result of) a potential trial." *United States v. Booker*, 543 U.S. 220, 254 (2005) (Breyer, J.). In other words, the outcome of a plea bargain reflects, among other things, the views of both prosecutor and defendant regarding the likelihood and severity of a negative result should a trial occur. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992) (explaining that going to "trial means . . . tak[ing] the risk of conviction or acquittal; risk-averse persons prefer a certain but small punishment to a chancy but large one."); *see also* Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1920 (1992) (discussing the impact on plea bargaining when there is a "large differential between post-trial and post-plea sentences").

Notwithstanding Congress' express intention to treat drug use as a misdemeanor, the lower court has placed the specter of a felony conviction and a substantially lengthier term of incarceration over a drug possessor's head, and thereby given prosecutors an enormous and unwarranted amount of leverage in plea negotiations with defendants charged with possessing drugs for their own use. Specifically, the lower court's interpretation of Section 843(b) increases the maximum term of imprisonment facing the typical possessor by 400%. By drastically increasing the potential maximum penalty, the lower court has fundamentally altered the calculus that must be performed by an accused, and in so doing, has given prosecutors unwarranted leverage in plea negotiations.

The impact on plea negotiations resulting from the lower court's ruling is significant. Under the congressionally-imposed scheme – in which it established different punishments for possessors and distributors – it is not difficult to imagine a possessor who would be willing to exercise his or her constitutional rights, and require the prosecution to prove its case beyond a reasonable doubt at trial. Such a defendant might, after consulting with counsel and evaluating the evidence, deem the prosecution's case to be sufficiently weak such that the benefits of trial outweigh the perceived risk of a loss. And in some number of these cases, the defendant would prove successful – *i.e.* the jury would find that the government had not met its burden, and it would acquit the defendant.

Under the scheme imposed by the lower court, it is not difficult to imagine that same defendant – presented with the same underlying facts but faced with a 400% harsher punishment upon a loss at trial – opting to plead guilty. This defendant might do so notwithstanding the fact that, in at least some instances, he or she would have been acquitted at trial. Of course, this risk exists whenever a defendant pleads guilty, but the dramatically higher penalty facing a possessor under the lower court's interpretation of Section 843(b) increases this risk and places a thumb on the scale in favor of a plea. Any decision that has the potential to alter fundamentally the plea bargaining process – and thus virtually every federal criminal case involving possession of narcotics – by giving prosecutors the power to prosecute crimes beyond what Congress intended and provided should be addressed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 15, 2008

AMICUS CURIAE BRIEF

105

(3)

No. 08-192

Supreme Court, U.S.
FILED
SEP 15 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALMAN KHADE ABUELHAWA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the use of a telephone to buy drugs for personal use "facilitates" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony).

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association working in the interest of criminal defense attorneys and their clients.[1] NACDL was founded to ensure justice and

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other

due process for persons accused of crimes and other misconduct. NACDL has more than 12,800 members—joined by 94 affiliate organizations with 35,000 members—including criminal defense lawyers, active U.S. military defense counsel, and law professors committed to preserving fairness within America's criminal justice system.

The Fourth Circuit's decision in this case holds that, although acquiring illicit drugs for personal use is ordinarily a misdemeanor under the federal drug laws, anyone who uses a cell phone (or any other "communication facility") to do so may be charged with a felony violation of 21 U.S.C. § 843(b)—facilitating the seller's commission of felony drug distribution. That ruling is of vital importance to NACDL and its members, who routinely represent criminal defendants facing federal drug charges. Given the increasingly pervasive use and extraordinary mobility of today's "communication facilit[ies]," the Fourth Circuit's construction threatens to turn almost any personal-use purchase into a felony offense. That does not merely contravene Congress's intent, which was to distinguish sharply between drug users and drug distributors. It also undermines efforts to ensure that drug users receive the treatment and opportunities that will maximize the likelihood of their rehabilitation and reintegration as useful members of society. NACDL thus has a unique perspective on, and a keen interest in ensuring, proper resolution of the question presented consistent with equitable and evenhanded administration of the federal drug laws.

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than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioner and respondent were notified of the intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

REASONS FOR GRANTING THE PETITION

The courts of appeals are now squarely divided on an issue of ever-increasing importance to defendants and the government alike: Whether an individual who acquires illegal narcotics for personal use—ordinarily a misdemeanor under federal law—can be charged with a federal felony offense under 21 U.S.C. § 843(b) if he uses a cellular phone, e-mail, or any other "communication facility" in doing so. Three courts of appeals (the Sixth, Ninth, and Tenth Circuits) have concluded that Section 843(b) does not reach purchases for personal use, while at least two others (the Seventh Circuit and the Fourth Circuit below) have drawn the opposite conclusion. That square conflict by itself justifies this Court's review. Defendants should not receive a different brand of federal justice depending on the happenstance of geography; Congress enacted a single Title 21 of the United States Code, and that Title should have a single meaning throughout the Nation.

The issue is, moreover, of great and ever-increasing significance. When Congress comprehensively revised the federal drug laws, it sought to distinguish between drug users or addicts on one hand and drug dealers on the other, deeming the former misdemeanants and the latter felons. That distinction serves important purposes. Perhaps most importantly, it distinguishes between defendants based on culpability. It also ensures that the harsh penalty of extensive incarceration that accompanies a felony conviction will not necessarily be meted out to drug users and addicts who have a greater chance of being rehabilitated if they are not incarcerated on felony charges. The decision below destroys the distinction Congress sought to draw, converting mere users from misdemeanants into federal felons whenever they happen to call, e-mail, or text-message their suppliers. Indeed, given the increasing ubiquity of cell phones, text

messages, e-mails, and other means of electronic communication in our daily lives, the Fourth Circuit's decision threatens to obliterate that distinction in virtually every case.

I. The Courts Of Appeals Are Squarely Divided On An Increasingly Important And Recurring Issue

A. The Courts Of Appeals Disagree On Whether Section 843(b) Extends To Use Of A Communication Facility For Personal-Use Purchases

Section 843(b) of Title 21 makes it a felony for "any person knowingly or intentionally to use any communication facility" (including traditional telephones, cellular phones, and e-mail) "in committing or in causing or facilitating the commission of any act or acts constituting a felony" under the federal drug laws. There can be no dispute that the courts of appeals are squarely divided on whether the purchase of drugs for personal use—itself a misdemeanor under federal law—"facilitates" the commission of a felony drug offense by the seller within the meaning of Section 843(b). The circuit conflict was expressly acknowledged by the Fourth Circuit below:

> We begin with the recognition that our sister circuits are divided on the issue facing us; some find that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated. * * * In contrast, other circuits have concluded that [using a communication facility to acquire drugs] for personal use [is] covered by § 843(b).

Pet. App. 9a-10a. The conflict has been recognized by the Seventh Circuit as well. *United States* v. *Binkley*, 903 F.2d 1130, 1135-1136 (7th Cir. 1990). And it has been repeatedly acknowledged by the district courts. See, *e.g.*, *United States* v. *Lewis*, 387 F. Supp. 2d 573, 579 (E.D. Va. 2005) ("[A] circuit split does exist on the reach of

section 843(b) * * * ."); *United States* v. *Colla*, No. 06-CR-336, 2008 WL 1969600, at *4 n.2 (E.D. Wis. May 3, 2008) ("There is a circuit split on this issue * * * .").

Those acknowledgements are clearly correct. The Fourth Circuit (in the decision below) and Seventh Circuit (in two earlier decisions) have now squarely held that, when a defendant uses a cellular telephone or other communication facility to acquire illegal narcotics for his own misdemeanor personal use, he may be charged with facilitating the seller's felony distribution under 21 U.S.C. § 843(b). For example, in *United States* v. *Kozinski*, 16 F.3d 795 (7th Cir. 1994), the Seventh Circuit held that whenever, "by use of their telephone, the [defendants] have made the distribution of the cocaine" by the sellers "easier, they have facilitated it and violated the statute." *Id.* at 807. Rejecting the claim that one who purchases for personal use does not "facilitate" the offense of the seller, the court declared that "[w]hat [the defendants] do with the cocaine after it is distributed is irrelevant to whether they facilitated distribution [to themselves]; the crime is complete long before they use or dispose of the cocaine." *Ibid.* "[T]he defendants' status as buyers or distributors is of no consequence regarding section 843(b); rather, their status as facilitators alone gives rise to criminal liability." *Ibid.*

The decision below reached the same result. The court of appeals stated that, because Section 843(b) "does not specify *whose* felony must be at issue," it applies so long as the purchaser's use of a phone or communication facility to acquire drugs for personal use makes the seller's felony "distribution easier." Pet. App. 11a. The court therefore upheld petitioner's felony conviction for using a cell phone to acquire a personal-use quantity of illegal narcotics, even though he would have been guilty at most of a misdemeanor absent use of the cell phone. See also *Binkley*, 903 F.2d at 1135-1136 (holding that the

defendant/purchaser's telephone conversations with the seller "facilitated" the seller's felony distribution, making him liable under Section 843(b), because the call "not only made [seller's] sale of cocaine (a felony under Title II of the Act) easier, it made the sale possible.").

By contrast, three other courts of appeals have held that the use of a telephone to purchase drugs for personal use does not constitute a violation of Section 843(b). See *United States* v. *Baggett*, 890 F.2d 1095, 1097-1098 (10th Cir. 1989); *United States* v. *Martin*, 599 F.2d 880, 888 (9th Cir. 1979); *United States* v. *Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) (per curiam). In *Baggett*, for example, the Tenth Circuit found that the federal drug enforcement scheme "clearly places mere 'customers' in the misdemeanor category" and rejected the government's argument that anyone who uses a telephone to obtain drugs for personal use is suddenly transformed into a felon. *Baggett*, 890 F.2d at 1097. Similarly, the Ninth Circuit has stated that, "[t]o hold that persons who merely buy drugs for their personal use are on equal footing with distributors by virtue of the facilitation statute would undermine [the statutory distinction between distributors and simple possessors]." *Martin*, 599 F.2d at 889. Finally, the Sixth Circuit, relying on the Ninth Circuit's opinion in *Martin*, has held that the use of a telephone to purchase drugs for personal use does not constitute facilitation of a drug distribution conspiracy. *Van Buren*, 804 F.2d at 892.[2]

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[2] While conceding the existence of a square circuit conflict, the decision below does not properly reflect the alignment of the circuits. As an initial matter, it states that the Sixth Circuit's decision in *Van Buren*, *supra*, is inapplicable because that decision addresses only whether the use of a telephone to purchase drugs for personal use facilitates a drug *conspiracy*, not drug distribution. Pet. App. 10a n.6. That is a distinction without a difference. The inquiry is whether the purchase of drugs for personal use, itself a mis-

That conflict itself is reason enough for this Court to grant review. Whether or not a defendant has committed a federal drug felony by purchasing a personal-use quantity of drugs using a cell phone should not depend on the happenstance of geography. The meaning of our Nation's criminal laws should not vary with whether the conduct occurs in Los Angeles or Chicago.

B. The Conflict Has Ever-Increasing Importance

The issue, moreover, is exceedingly important and has increasing ramifications (even apart from its impact on Congress's goals, as discussed below). As this case and the others cited above make clear, the aggressive use of Section 843(b) to pursue drug users (as opposed to distributors) cannot be dismissed as a lark: It is a practice that is now endorsed by at least two circuits. Further, the available cases necessarily understate the magnitude of the problem because they do not and cannot reflect the instances in which personal-use defendants, threatened with a felony charge under Section 843(b), plead guilty to lesser charges to avoid that possible consequence. There is no reason why some defendants should confront the threat of felony criminal

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demeanor, can facilitate the commission of a felony by the seller. With respect to that issue, the Sixth Circuit clearly held that the purchaser *does not* facilitate the commission of the felony. *Van Buren*, 804 F.2d at 892. There is, moreover, simply no textual or other basis for distinguishing between the alleged facilitation of distribution and the alleged facilitation of conspiracy to possess with intent to distribute. And the Sixth Circuit's decision in *United States* v. *McLernon*, 746 F.2d 1098 (6th Cir. 1984), invoked by the decision below, is inapposite. In *McLernon*, the Sixth Circuit held that Section 843(b) applied to a drug *dealer* who facilitated the purchase of drugs for *distribution*. *Id.* at 1106-1107. For present purposes, however, any debate concerning the state of the law in the Sixth Circuit (or the Fifth and Eleventh) is beside the point. Whether the line-up is three to two, two to two, or two to five, the circuits are clearly divided.

liability in some circuits while defendants engaging in identical conduct in other circuits do not.

The importance of the issue is also increasing. In today's mobile and digital society, electronic communications—cellular phones, e-mail, text messages, and instant messaging—are rapidly displacing in-person communications for almost every sort of interaction. In the last five years, the number of mobile wireless telephone subscribers grew by almost 100 million.[3] E-mail proliferates. Internet usage is ubiquitous as well.[4]

Perhaps most significantly, text-messaging has shown astronomical growth over the past few years. Just 10 years ago, text-messaging was virtually unheard of in this country. According to the Cellular Telephone Industry Association (CTIA), Americans sent 57.2 billion text messages in 2005, and now send more than ten times that amount—about 600.5 billion text messages—a year. See CTIA Wireless Quick Facts, http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited Sept. 15,

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[3] Compare Fed. Commc'n. Comm'n., Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Chart 11.1 (2008) (241,834,000 subscribers per Form 502) (*avail.* at http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0828/DOC-284932A1.pdf), with Fed. Commc'n. Comm'n., Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Table 11.1 (2003) (141,776,000 subscribers per Form 502) (*avail.* at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend803.pdf).

[4] On average, Americans now spend 26 hours and 26 minutes per month using the Internet. Gary Holmes, The Nielsen Company, *Press Release, Nielsen Reports TV, Internet and Mobile Usage Among Americans*, July 8, 2008 (*avail.* at http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=fe63c9769fcfa110VgnVCM100000ac0a260aRCRD).

2008).[5] Most of that growth is among America's youth.[6] Indeed, among high school youth, the text message has virtually replaced the whisper as the preferred means of communicating during class.[7] The court of appeals' theory in this case, however, could convert one student's text-messaged inquiry about his neighbor's willingness to bring his ecstasy to a party and share it—"R U able to brng X to prty tnite" or "can U bring?"—into a potential

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[5] By contrast, in 2000, the total number of text messages sent in the United States was less than .003 percent of that total, or about 14.4 million. MarketWatch, *Text Messaging Use in South Carolina Soars by Nearly 500 Percent*, July 23, 2008 (*avail.* at http://www.marketwatch.com/news/story/text-messaging-use-south-carolina/story.aspx?guid=%7BE2BEF5B9-0D18-4ED1-A5FC-84E5917503F5%7D&dist=hppr).

[6] Teens send, on average, 455 text messages and receive 467 messages each month; they thus send and receive about 15 or 16 text messages a day. Reuters, *Text Messaging Improves Parent-Teen Relationship*, April 16, 2008 (*avail.* at http://www.reuters.com/article/pressRelease/idUS117578+16-Apr-2008+BW20080416). Consumers most likely to send and receive text messages are those between 13 and 24 years old. Margaret Webb Pressler, *For Texting Teens, an OMG Moment When the Phone Bill Arrives*, Wash. Post, May 20, 2007, at A1. As of 2006, 65% of people ages 18-29 used their cell phones for text messaging, compared with 37% of people ages 30-49, 13% of people ages 50-64, and 8% of people 65 and older. Lee Rainie, *PEW Internet & American Life Project, PEW Internet Project Data Memo* 6 (2006) (*avail.* at http://www.pewinternet.org/pdfs/PIP_Cell_phone_study.pdf). About 85 percent of teens ages 12-17 engage in some form of electronic communication, including text messaging, sending email, or instant messages. Amanda Lenhart *et al.*, *Pew Internet & American Life Project, Writing, Technology and Teens* 3 (2008) (*avail.* at http://www.pewinternet.org/pdfs/PIP_Writing_Report_FINAL3.pdf).

[7] See Tony Gonzalez, *Know Your Text-Messaging Limits Before Being Caught at School*, Minneapolis Star Tribune, Sept. 4, 2008, at E1; Lisa Guernsey, *When Gadgets Get in the Way*, N.Y. Times, Aug. 19, 2004, at G1.

federal felony.[8] It is hard to see why the individual who obtains a personal-use quantity of drugs by whispering an inquiry about its availability to his neighbor in class should be guilty of a misdemeanor, while the person who texts the same inquiry to the same neighbor should be guilty of a felony. See pp. 17-19, *infra*. More fundamentally, the utter breadth of the government's theory amply evidences the importance of the issue and the need for this Court to resolve it.

The Fourth and Seventh Circuits' position on this issue also has ramifications well beyond Section 843(b). In essence, those courts reason that a purchaser uses a cell phone to "facilitate" his supplier's felony sale of narcotics if he uses that phone to contact the supplier. In their words, the use of the phone does not merely make the seller's "distribution easier"; "it ma[kes] the sale possible." Pet. App. 11a (quoting *Binkley*, 903 F.2d at 1136). But that same rationale could threaten to convert virtually *any* purchaser of personal-use narcotics into a federal felon, even if the purchaser does *not* use a cell phone.

The federal aiding-and-abetting statute, 18 U.S.C. § 2(a), provides anyone who "aids and abets" or "procures" another's commission of "an offense against the United States" is "punishable as a principal." Under the Fourth and Seventh Circuits' reasoning, personal-use purchasers might be accused of "aiding and abetting" or "procuring" the seller's felony act of distributing the

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[8] Some courts have held that sharing narcotics with a friend can be a felony. See, *e.g.*, *Washington* v. *United States*, 291 F. Supp. 2d 418, 436 (W.D. Va. 2003) ("Sharing with friends is distribution, and it is no defense that Washington did not know that his acts would be considered distribution under 21 U.S.C. § 841(a)."); see also *United States* v. *Wallace*, 532 F.3d 126, 128-129 (2d Cir. 2008); *United States* v. *Washington*, 41 F.3d 917, 919 (4th Cir. 1994); *United States* v. *Ramirez*, 608 F.2d 1261, 1264 (9th Cir. 1974).

drug to them. The purchaser's act of showing up to make the purchase, for example, does not merely make the seller's "distribution easier"; "it ma[kes] the sale possible." Pet. App. 11a (quoting *Binkley*, 903 F.2d at 1136). The notion that every purchaser of drugs is liable as a principal for felony distribution, because his making a purchase aids and abets the seller's felony sale, should be promptly dismissed as absurd. The fact that the Fourth and Seventh Circuits' reasoning could threaten that ridiculous over-expansion of federal felony liability likewise weighs in favor of granting review.

II. The Fourth Circuit's Expansion Of Section 843(b) Threatens Profoundly Negative Consequences For The Administration Of Federal Drug Laws And The Goal Of Rehabilitation

This case is also important because of its potential impact on individual defendants and society at large. When Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, Congress sought to distinguish between drug users and drug distributors. The decision below effectively guts that distinction and, in the process, guts the policy goals Congress sought to achieve.

A. The Fourth Circuit's Opinion Circumvents The Distinction Between Drug Felonies And Misdemeanors

When Congress crafted the Comprehensive Drug Abuse Prevention and Control Act—including Section 843(b)—Congress sought "to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *Martin*, 599 F.2d at 889. Congress adopted the philosophy of the President's Advisory Committee on Narcotic and Drug Abuse (the "Prettyman Commission"), established by President Kennedy in 1963. See H.R. Rep. No. 91-1444, at 8-10 (1970) (*reprinted* 1970

U.S.C.C.A.N. 4566, 4574-4575). Although the Prettyman Commission proposed strident measures to combat drug trafficking, it advocated lesser penalties for individual drug abusers in order to promote rehabilitation. *Id.* at 10 (*reprinted* 1970 U.S.C.C.A.N. at 4575). As a result, simple possession, or possession for personal use, is classified as a misdemeanor while possession with intent to distribute is a felony. *Id.* at 11 (*reprinted* 1970 U.S.C.C.A.N. at 4577).

The decisions of the Fourth and Seventh Circuits, however, eradicate that distinction whenever the drug user employs *any* communication facility in acquiring his drugs. Under those precedents, Congress's careful distinction simply becomes irrelevant once a phone becomes involved. The potential impact of such a rule was broad two decades ago, when the Sixth Circuit observed that "the use of a telephone by those engaged in narcotics transactions is very common." *United States* v. *Dotson*, 871 F.2d 1318, 1326 (6th Cir. 1989). But, in the modern era of electronic- and network-driven communications, those rulings could convert almost every misdemeanor acquisition of personal-use drugs into a felony.

That has serious consequences for individual defendants. While possession of a personal-use quantity of drugs is a misdemeanor punishable by a maximum sentence of one year of imprisonment, a minimum $1,000 fine, or both, 21 U.S.C. § 844(a), felons face the prospect of serious time in prison. A felony conviction under Section 843(b) is punishable by up to four years of incarceration, a fine under Title 18, or both. 21 U.S.C. § 843(d). For some individuals, that felony offense could have serious collateral consequences as well. As discussed in the petition, it could become a predicate crime for certain recidivism-based sentencing enhancements, and can result in deportation for resident aliens such as petitioner in this case. See Pet. 16.

A felony conviction under Section 843(b) also has significant collateral consequences for some of the most important rights a citizen can have in our republican form of government. Criminal disenfranchisement laws routinely deny those convicted of felonies the right to vote. In 46 States and the District of Columbia, citizens who are incarcerated lose the right to vote. Jamie Fellner & Marc Mauer, *Losing the Vote, the Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project, Table 1 (1998) (*avail.* at http://www.hrw.org/reports98/vote/usvot98o.htm). Felons on parole are disenfranchised in 32 States, while 29 States disenfranchise those on probation. *Ibid.* Another 14 States disenfranchise former felons even after their sentences are served, with ten States disenfranchising felons permanently. *Ibid.*

Conviction of a crime punishable by imprisonment for more than one year—including a violation of Section 843(b)—also disqualifies citizens from serving on a federal jury indefinitely (absent a restoration of civil rights). See 28 U.S.C. § 1865(b)(5). "The only method currently provided by federal law to restore civil rights is a pardon." Office of the Pardon Attorney, *Federal Statutes Imposing Collateral Consequences Upon Conviction* 1 (2000).

Finally, a felony conviction or imprisonment can have a devastating impact on an individual's ability to earn a living and financial well-being. For example, a convicted felon may not be able to serve his country by enlisting in the armed forces, 10 U.S.C. § 504(a), or be permitted to be a pilot or flight instructor, 14 C.F.R. § 61.15(c), (d). Although a felony conviction does not disqualify a person from federal employment, it "is a factor in determining suitability for it." Office of the Pardon Attorney, *supra*, at 3. A felony conviction, moreover, may cost the convicted individual not merely his job but also his home and

safety net. Those convicted of an offense punishable by more than one year of incarceration, such as Section 843(b), may find their property forfeited under 21 U.S.C. § 881(a)(7). They can be evicted from public housing under 42 U.S.C. § 1437f(d)(1)(B)(iii). And they may lose federal benefits as well. For example, federal law denies a $1500 tax credit to students and their families if the student has been convicted of a drug felony. Robin Levi & Judith Appel, Office of Legal Affairs, *Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use* 4 (2003). Those individuals with felony drug convictions are also permanently barred from receiving food stamps and cash benefits funded under part A of Title IV of the Social Security Act. *Id.* at 4-5 (citing 21 U.S.C. § 862a).

B. The Fourth Circuit's Opinion Undermines The Goal Of Rehabilitating Drug Abusers

One of the policies served by the distinction between drug users and drug dealers is rehabilitation. See H.R. Rep. No. 91-1444, at 8-10, 18-19 (*reprinted* 1970 U.S.C.C.A.N. at 4574-75, 4584-85). That makes sense. While substance-abuse treatment programs are often available in federal prisons, those convicted of an offense are more likely to receive treatment or participate in a substance-abuse program while on probation or parole, rather than in prison or jail. Bureau of Justice Statistics, *Substance Dependence, Abuse, and Treatment of Jail Inmates* 8 (2002). Incarceration, moreover, often prolongs the road to recovery or simply exacerbates pre-existing addiction. As a result, many have come to the conclusion that "jail sanctions are not a recognized part of any medically accepted approach for the treatment of

alcohol or drug addiction, or as a medically appropriate response to alcohol or drug relapse * * * ."[9]

By conflating the drug user with the drug seller, the Fourth and Seventh Circuits play havoc with Congress's effort to rehabilitate the former. Surrounding drug users in prison with hardened criminals and drug traffickers for a potentially extended period of time is simply counterproductive where the goal is reformation and reintegration into society.[10] Yet that is precisely the approach that the Fourth and Seventh Circuits would impose.

The impact, moreover, extends beyond incarceration itself. Increasingly, modern criminology has recognized that rehabilitation and reform can require the offender to create or renew a "pro-social" identity, a process called "desistance." Stephen Farrall & Shadd Maruna, *Desistance-Focused Criminal Justice Policy Research: Introduction to a Special Issue on Desistance from Crime and Public Policy*, 42 How. J. of Crim. Just. 358, 358-359 (2004). Permanently branding the offender as a "felon" —and denying him the myriad rights described above— can have a devastating effect on that process: It can reinforce the offender's criminal identity and make it more

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[9] See Declaration of Peter Banys, M.C., M.Sc., in Support of Temporary Restraining Order and Preliminary Injunction at 3, ¶ 11, in *Gardner* v. *Schwarzenegger*, No. RG06278911 (Cal. Super. Ct. July 13, 2006). For that reason, many state governments are recognizing the negative impact of a jail sentence on drug rehabilitation. Since 2000, at least 17 States have rolled back mandatory minimum sentences and similar harsh penalties for nonviolent offenders, particularly individuals convicted of drug offenses. Scott Ehlers & Jason Ziedenberg, Justice Policy Institute, *Proposition 36: Five Years Later* 1 (2006).

[10] In the words of Anthony Burgess, "Cram criminals together and see what happens. You get concentrated criminality, crime in the midst of punishment." *A Clockwork Orange* 102 (W.W. Norton & Co. 1986) (1962).

difficult for him build a new, civic-minded one.[11] By choosing to treat drug users as misdemeanants, Congress maximized their chances at rehabilitation by shedding their identity as criminals. By permanently branding those same individuals as felons (for having "facilitated" their source's felony of selling to them), the Fourth and Seventh Circuits undermine that goal.

C. The Court of Appeal's Contrary Analysis Is Fundamentally Mistaken

The court of appeals did not seriously dispute the above analysis. It did not deny that Congress carefully distinguished between drug users and drug sellers, deeming the former misdemeanants and the latter felons. Nor did it dispute that allowing mere purchasers of personal-use quantities to be prosecuted as felons whenever they use a phone effectively eviscerates that careful distinction. Instead, the court relied on what it thought was the import of Section 843(b)'s plain text and its own notions of the statute's underlying policies.

1. With respect to text, the Fourth Circuit simply ignored a critical background principle—that one cannot be guilty of aiding and abetting a "sale" merely by participating in the sale as a purchaser. See Pet. 18-19. As petitioner explains in detail, common-law principles, the Model Penal Code, and this Court's cases have all long made clear that one does not "facilitate" illegal activity within the meaning of federal law merely by "patroniz[ing]" it as a customer. *Id.* at 18-20. Congress was presumably aware of those principles when it enacted Sec-

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[11] See Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* 165 (2001); John Laub & Robert Sampson, *Understanding Desistance from Crime*, 28 Crime and Justice: A Review of Research 1 (M. Tonry ed. 2000); Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of An Identity Theory*, 63 Soc. Psychol. Q. 284 (2000).

tion 843(b). The contrary view, moreover, could render virtually *every* purchaser a potential felon, even if he does not use a phone, since showing up to make a purchase in some sense could be said to facilitate the seller's felony distribution. See pp. 10-11, *supra*. Congress clearly did not intend that result: "If the abuser is to be penalized, he should not be penalized in the spirit of distribution." H.R. Rep. No. 1444, at 9 (*reprinted* 1970 U.S.C.C.A.N. at 4575).

Finally, as petitioner explains, the Fourth Circuit's decision is difficult to reconcile with Congress's deliberate decision to restrict Section 843(b) to conduct that facilitates a drug "felony," excluding the misdemeanors. Pet. 23. The Fourth Circuit's decision in this case brings the most significant category of misdemeanor offenses—*i.e.*, personal-use offenses—within Section 843(b)'s scope. That is not merely clearly contrary to Congress's intent. Pet. 23. It is also contrary to the settled rules of statutory construction. This Court will not adopt a proposed construction that "would render" a critical term superfluous or "insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); see also *Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879) (a statute "ought * * * to be so construed" if possible so that "no clause, sentence, or word shall be superfluous, void, or insignificant"). The Fourth Circuit's approach has precisely that effect. Congress carefully chose to insert the word "felony" into Section 843(b) so as to limit its reach to uses of communication facilities that facilitate *felony* offenses. By sweeping the most significant misdemeanor offense within Section 843(b)'s scope, the Fourth Circuit's decision renders Congress's use of the word "felony" utterly insignificant.

2. Nor does the Fourth Circuit's analysis of the policy underlying Section 843(b) make sense. According to the Fourth Circuit, Congress might have had good reason to make the transaction at issue here a misdemeanor

if conducted in person, but a felony once the purchaser used a phone. Using communication facilities, the court of appeals stated, "makes it easier for criminals to engage in skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement." Pet. App. 12a. That proves too much. If Congress's goal was to increase the penalty whenever someone uses a cell phone—because it putatively makes detection more difficult or because Congress sought to protect communications networks from misuse—there would have been no reason for Congress to limit Section 843(b) to use of a communication facility to facilitate a "felony" drug offense; it would have drafted the provision to address use of a communication facility to facilitate *any* drug offense. Nor is it sensible to suggest that using a communication facility makes detection more difficult. E-mail, text-messaging, and faxing all leave an electronic or physical paper trail where whispers in an alley will not.

In any event, it is nonsensical to suggest that Congress somehow had a preference for in-person transactions in open-air drug markets. Those markets often operate in a specific, geographically defined area at identifiable times so that buyers and sellers are able to locate one another with ease. See Alex Harocopos & Mike Hough, Community Oriented Policing Services, *Drug Dealing in Open-Air Markets* 1 (2005). Such street dealing has numerous societal impacts affecting people other than the purchaser and seller. Open-air drug markets blight inner-city neighborhoods, reducing economic, educational, and social opportunities available to law-abiding adults and children. Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 Conn. L. Rev. 571, 584 (1995). Street dealing increases violent crime, with dealers routinely battling for territory to sling their wares, endangering innocent bystanders and law enforce-

ment personnel. *Ibid.*; see also *Cotton* v. *State of Maryland*, 872 A.2d 87, 92-93 (Md. 2005).[12] And open-air drug markets have a disparate impact on those who occupy inner-city areas and neighborhoods. National Drug Intelligence Center, *Washington/Baltimore High Intensity Drug Trafficking Area Drug Market Analysis* 9 (2008). Whatever might be said about Congress's chosen policies for combating illegal drug use and distribution, favoring street-dealing over electronic communications is not among them.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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[12] Simply arresting buyers and sellers in open-air markets is unlikely to have a significant impact on the size of the market, as new dealers spring up to take the place of those that have been taken off the streets. Harocopos & Hough, *supra*, at 2.

PETITIONER'S BRIEF

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Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

No. 08-192

IN THE

Supreme Court of the United States

SALMAN KHADE ABUELHAWA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the use of a telephone to buy drugs for personal use "facilitates" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony).

PARTIES TO THE PROCEEDING

Petitioner is Salman Khade Abuelhawa, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Fourth Circuit is reported at 523 F.3d 415 and reprinted at Pet. App. 1a-18a. The order denying a petition for rehearing en banc is unreported and reprinted at Pet. App. 37a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The judgment of the court of appeals was entered on April 25, 2008. Pet. App. 1a. A petition for rehearing en banc was denied on May 23, 2008. Pet. App. 37a. The petition for a writ of certiorari was filed on August 13, 2008 and granted on November 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant statutes and Acts of Congress are reproduced in appendices to this brief. App., *infra*, 1a-11a.

STATEMENT OF THE CASE

A. Statutory Background

The Narcotic Control Act of 1956 made it a felony, punishable by two to five years of imprisonment, to "use[] any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an *offense*" under various provisions of the federal drug laws. Pub. L. No. 84-728, § 201, 70 Stat. 567, 573 (1956) (codified at former 18 U.S.C. § 1403 (repealed)) (emphasis added). At the time, all of the predicate "offense[s]" covered by that commu-

nication facility provision, including the purchase of drugs for personal use, were felonies. For example, the general narcotics distribution offense imposed felony criminal penalties on any person who "receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug," knowing that it was imported. *Id.* § 105, 70 Stat. at 570 (codified at former 21 U.S.C. § 174(c) (repealed)). The government could use that offense as the predicate offense under the communication facility provision to charge a drug user with using a phone to purchase a small quantity of drugs for personal use. *See United States v. Butler*, 204 F. Supp. 339, 340-41, 344 (S.D.N.Y. 1962) (defendant charged under former § 1403 with using a telephone in attempting to buy a "half ounce of stuff").

Fourteen years later, in the Controlled Substances Act of 1970 (CSA), Congress comprehensively revised the federal drug laws. For the first time, Congress drew a sharp distinction between drug trafficking and drug use, carving out a new offense for the "simple possession" of drugs for personal use and making that offense a misdemeanor, not a felony. Pub. L. No. 91-513, Tit. II, Pt. D, § 404(a), 84 Stat. 1236, 1264 (1970) (codified as amended at 21 U.S.C. § 844(a)). In addition, Congress created special probation and dismissal procedures for the new offense of misdemeanor simple possession, allowing first-time offenders to avoid the entry of a conviction altogether by satisfying a term of probation of up to one year. *Id.* § 404(b), 84 Stat. at 1264 (codified as amended at 18 U.S.C. § 3607(a)).

In an immediately adjacent provision of the CSA, Congress simultaneously amended the communication facility statute to restrict its reach. Congress

confined the provision's scope to the facilitation or commission only of a drug "felony," rather than of any drug "offense." The revised communication facility provision, which remains in effect today, makes it "unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a *felony*" under various federal drug laws. CSA § 403(b), 84 Stat. at 1263 (codified at 21 U.S.C. § 843(b)) (emphasis added). Congress also reduced the penalty for the communication facility offense to a sentence of "not more than 4 years" of imprisonment. *Id.* § 403(c), 84 Stat. at 1263-64 (now codified at 21 U.S.C. § 843(d)).

B. Factual and Procedural Background

1. In 2000, the Federal Bureau of Investigation (FBI) began investigating whether Mohammed Said was distributing cocaine in the Skyline area of Virginia, near Washington, D.C. In June 2003, as part of that investigation, the FBI obtained authorization to place a wiretap on Said's cellular phone. Pet. App. 2a-3a; *see* 18 U.S.C. § 2518.

On July 5 and 12, 2003, the wiretap recorded a series of six cellular phone calls between Said and petitioner Salman Khade Abuelhawa. Speaking in Arabic and using code words, petitioner arranged to make two purchases of a small amount of cocaine. Pet. App. 3a-6a & n.2. Both the July 5 and July 12 calls arranged for the purchase of the "100 type," which a government expert witness testified was a reference to a single gram of cocaine, with a street value of $80-$120. *Id.* at 4a-5a.

On October 17, 2003, petitioner was arrested. After being advised of his *Miranda* rights, he agreed to

speak with FBI agents. Petitioner admitted that he was a drug user, and that he had purchased cocaine from Said in the past, usually in "one-half gram amounts." Pet. App. 6a. Petitioner explained that he normally received the cocaine from Said just outside the Skyline Grill in Falls Church, Virginia. Petitioner, however, made no statements indicating that he had purchased cocaine on July 5 or 12, 2003, and the government recovered no drugs and admitted no drugs into evidence. *Id.* at 6a, 14a.

On January 25, 2007, a federal grand jury charged petitioner with seven counts of using a telephone in committing, causing, and facilitating a drug felony, in violation of 21 U.S.C. § 843(b). Pet. App. 6a-7a. Counts 2-4 concerned the calls made on July 5, 2003, and Counts 5-7 concerned the calls made on July 12, 2003.[1] *Id.* at 7a. Because "[e]ach separate use of a communication facility" constitutes "a separate offense," 21 U.S.C. § 843(b), a district court may impose separate and consecutive sentences of up to four years of imprisonment for each phone call. Petitioner thus faced a sentence of up to 24 years of imprisonment for using his phone to purchase two grams of cocaine for personal use.

The case proceeded to trial, where the government made no claim—and introduced no evidence—that petitioner was a drug dealer or anything more than a user. The government therefore did not dispute that petitioner's purchase of cocaine was solely for his own personal use, or that his possession of the cocaine constituted only the misdemeanor of

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[1] Count 1, which concerned a call made on June 29, 2003, was dismissed before trial. Pet. App. 7a.

simple possession, 21 U.S.C. § 844(a). The government nonetheless took the position that petitioner had facilitated a drug "felony" for purposes of the communication facility provision, 21 U.S.C. § 843(b), asserting that petitioner's use of a phone to obtain drugs for his own personal use had also facilitated *Said*'s felonious distribution of the drugs to petitioner. Pet. App. 26a-27a; *see* 21 U.S.C. § 841(a)(1).

At the close of the government's case, petitioner moved for a judgment of acquittal on the ground that, by purchasing drugs for personal use, he had facilitated only the misdemeanor offense of simple possession. Pet. App. 20a-25a; *see* 21 U.S.C. § 844(a). The district court denied the motion. It agreed with the government that, although petitioner had purchased the drugs for personal use, his cellular phone calls had facilitated Said's felony offense of cocaine distribution. The court considered Section 843(b) to "apply to a situation like this, because but for the phone conversation, this particular distribution would not have occurred. So it facilitated [the distribution]." Pet. App. 21a.

Defense counsel objected that, because "everybody's using cell phones," the court's interpretation of Section 843(b) would "feloniz[e] a gigantic group of people" and allow "the U.S. Attorney's Office [to] now come in and say, hey, you're going to be guilty of a felony, you know, Simple User, unless you roll." Pet. App. 24a. The court acknowledged that "it may not make sense to ratchet up what would probably be a simple possession case to a felony," *id.* at 21a, and that, in this case "a misdemeanor might have been a more appropriate charge," *id.* at 24a. But, noting that the government "for whatever reasons chose to proceed this way," the court explained that it

"doesn't get involved" with "charging decisions," and held that Section 843(b) is applicable in the circumstances. *Id.*

The jury convicted petitioner on all counts, and petitioner renewed his motion for a judgment of acquittal following the verdict. The district court again denied the motion, but acknowledged that petitioner has "a legitimate legal argument which down the road [he] may be successful with that the conduct involved in this case does not amount to a violation of [Section] 843." Pet. App. 35a. The court sentenced petitioner to 24 months of probation and ordered him to pay a $2,000 fine. *Id.* at 7a-8a.[2]

2. The court of appeals affirmed. Pet. App. 1a-18a. The court acknowledged that petitioner had obtained drugs solely "for his personal use." *Id.* at 9a. But it rejected petitioner's contention that the use of a communication facility to purchase drugs for personal use falls outside the scope of Section 843(b). *Id.* at 8a-13a. While the jury had been permitted to find petitioner guilty of either "facilitating" or "causing" a "felony" under Section 843(b), *see* Pet. App. 26a-27a, 30a, the court of appeals sustained the convictions "by focusing only on whether [petitioner] facilitated the commission of a felony." *Id.* at 9a.

The court of appeals construed the term "facilitate" to mean, "to make easier or less difficult, or to assist or aid." Pet. App. 11a (quoting *United States*

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[2] Over the government's objection, the district court merged petitioners' counts of conviction such that petitioner ultimately was convicted of one count of violating Section 843(b) in connection with the July 5, 2003, cellular phone calls, and another count in connection with the July 12, 2003, calls. *See* Pet. App. 8a n.4, 34a-35a.

v. Lozano, 839 F.2d 1020, 1023 (4th Cir. 1988) (internal quotation marks omitted)). It also noted that, although Section 843(b) requires the use of a communication device to facilitate a drug felony, the "statute does not specify whose felony must be at issue, just that 'a' felony must be facilitated." *Id.* In this case, the court reasoned, petitioner's "use of his cell phone undoubtedly made *Said*'s cocaine distribution easier; in fact, 'it made the sale possible.'" *Id.* (quoting *United States v. Binkley*, 903 F.2d 1130, 1136 (7th Cir. 1990)).

The court of appeals rejected petitioner's contention that Congress could not have intended to transform his possession of drugs for personal use from a misdemeanor into a felony simply because he had used a phone in making his purchase, rather than conducting the entire transaction face-to-face. Pet. App. 12a. In the court's view, "Congress may reasonably have desired to increase criminal penalties for those who use [communication facilities] to evade detection by law enforcement." *Id.*

The court acknowledged "that [its] sister circuits are divided on the issue," with some courts of appeals holding that, "when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated." Pet. App. 9a-10a (citing *United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1989); *United States v. Martin*, 599 F.2d 880, 888-89 (9th Cir. 1979), *overruled on other grounds by United States v. De Bright*, 730 F.2d 1255 (9th Cir. 1984)). Those courts have concluded that "a mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress." *Id.* at 10a (quoting *Martin*, 599 F.2d at 889). But the court of appeals disagreed with those

courts, holding instead that "persons like [petitioner], who facilitate distribution of a controlled substance to themselves for personal use by using a communication facility, can be prosecuted for violating § 843(b)." *Id.* at 13a.

SUMMARY OF ARGUMENT

Section 843(b) makes it a felony to use a phone or other communication device in "facilitating" the commission of a drug "felony." When petitioner used his cellular phone to buy a small quantity of drugs for his own use, he may have "facilitated" his commission of misdemeanor simple possession. The court of appeals concluded that petitioner also "facilitated" his seller's "felony" distribution of the drugs to him, reasoning that petitioner had made the distribution easier. But that is merely the inevitable incident of facilitating his own misdemeanor. Construing the statutory terms in their overall context, rather than reading them mechanically in isolation, makes evident that the use of a phone to buy drugs for personal use does not "facilitate" the commission of a drug "felony" for purposes of Section 843(b).

As an initial matter, applying Section 843(b) to a person who buys a small quantity of drugs strictly for his own use would render the provision fundamentally inconsistent with the broader statutory treatment of drug users. Congress prescribed the imposition of stiff penalties against drug traffickers, but prescribed rehabilitation—rather than severe punishment—for mere drug users. Congress downgraded the simple possession of drugs for personal use from a felony to a misdemeanor, and enacted associated provisions allowing drug users to avoid conviction altogether by satisfying probationary condi-

tions. Applying Section 843(b) to the purchase of drugs for personal use would transform misdemeanant drug users into federal felons and subject them to severe punishment whenever, as is commonplace, they happen to exchange a phone call (or e-mail or text message) in obtaining drugs rather than conduct the transaction entirely face-to-face. That result cannot be squared with Congress's treatment of drug users elsewhere in the statute.

The statutory history of Section 843(b) confirms its inapplicability when a drug user makes (or receives) a phone call in obtaining a small quantity of drugs strictly for his own personal use. At the same time Congress downgraded possession for personal use to a misdemeanor, it simultaneously—in an immediately adjacent provision—narrowed the communication facility statute so that it no longer reached facilitation of a drug misdemeanor. Those mutually reinforcing changes fortify Congress's intention to exclude the newly created misdemeanant class of simple possessors from Section 843(b)'s reach. Applying Section 843(b) to the use of a phone to buy drugs for personal use, by contrast, would render Congress's narrowing of the provision of no practical effect in cases involving the newly created class of simple possessors.

The court of appeals' reading of Section 843(b) fails to square not only with statutory treatment of drug users and the statutory history of the provision, but also with an established background principle on aider-or-abettor liability directly applicable to Section 843(b). It has long been settled that a person who buys drugs does not thereby aid or abet his seller's unlawful distribution. Because the term "aid or abet" shares the same meaning as the term "facili-

tate," it follows that a person who buys drugs does not thereby "facilitate" his seller's "felony" distribution under Section 843(b). Of particular salience, even if a buyer of drugs could be viewed to "aid" his seller's distribution under a mechanical reading of the term "aid" in isolation, the buyer does not "aid" his seller's distribution for purposes of "aider or abettor" liability. Likewise, even if the buyer could be viewed to "facilitate" his seller's distribution under a mechanical reading of the term "facilitate" in isolation, a buyer does not "facilitate" his seller's "felony" distribution for purposes of Section 843(b).

The court of appeals speculated that Congress might have desired to subject drug users to felony prosecution whenever they use a phone to buy their drugs because of a concern that, by using a phone, drug users could more easily avoid detection. But if Congress in fact were concerned that drug users would avoid detection by using a phone, Congress would not have narrowed Section 843(b)'s reach to exclude the use of a phone to facilitate drug misdemeanors. There is no basis for supposing that Congress made the fundamental policy choice to treat drug users as misdemeanants and provide that they be rehabilitated rather than punished, but nonetheless intended to revert to severe punishment of those users who happen to make a phone call in obtaining their drugs.

There also is no merit to the government's contentions that excluding purchases for personal use would render Section 843(b) of no practical effect or difficult to administer. The government frequently applies Section 843(b) against drug traffickers in circumstances having nothing to do with the prosecution theory in this case. Section 843(b) serves impor-

tant functions in those situations, including allowing a separate felony charge for each phone call related to a single predicate felony, and giving the government a highly useful tool in plea bargaining. With respect to the provision's administrability, the government contends that it would be difficult to distinguish between possession for personal use and possession for distribution; but the government routinely proves that drugs are possessed for purposes of distribution in directly related contexts.

Finally, the general statutory treatment of drug users, the statutory history of Section 843(b) itself, and the settled background rule concerning aiders-or-abettors, together establish the provision's inapplicability in the circumstances of this case. But insofar as there remains any ambiguity concerning Congress's intentions, the rule of lenity dictates interpreting Section 843(b) to fail to encompass the use of a phone to buy drugs for personal use.

ARGUMENT

A PERSON WHO USES A PHONE TO BUY DRUGS FOR PERSONAL USE DOES NOT "FACILITATE" A DRUG "FELONY" WITHIN THE MEANING OF SECTION 843(b)

Section 843(b) of Title 21 makes it unlawful for a person to use a phone or other communication device in "facilitating" a drug "felony." A person who makes a phone call to obtain a small quantity of drugs for his own use may "facilitate" the misdemeanor of simple possession for personal use. *See* 21 U.S.C. § 844(a). The court of appeals held that the person not only "facilitates" his own misdemeanor possession, but also "facilitates" his seller's "felony" distribution

of the drugs to him. The court reasoned that the ordinary meaning of "facilitate" is "to make easier," and that a person who makes a phone call to purchase drugs for personal use "makes easier" his seller's "felony" distribution. Pet. App. 11a. But that is merely the inevitable incident of "facilitating" the misdemeanor. Under that approach, a drug user's misdemeanor purchase of drugs for his own use would be transformed into a felony whenever—as is routine—the parties exchange a phone call, e-mail, or text message about the transaction rather than conduct it entirely face-to-face. Treating as "facilitation" of a "felony" in this context the very same conduct that "facilitates" the "misdemeanor" would violate basic principles of statutory construction.

The court of appeals' interpretation suffers from the fundamental flaws of construing the terms of Section 843(b) in strict isolation, and of assuming that Congress invariably intends the terms of a statute to carry their broadest possible meaning. Under this Court's decisions, "[t]he definition of words in isolation" is not "necessarily controlling in statutory construction." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Nor does the Court assume that Congress intends the terms of a statute to "extend to the outer limits of [their] definitional possibilities." *Id.* Instead, when assessing the reach of a statutory provision, the Court considers the words "in their context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). As the Court has explained, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any prece-

dents or authorities that inform the analysis." *Dolan*, 546 U.S. at 486.

Three sources of context are of particular significance when construing Section 843(b). First, the Court examines the "words of a statute . . . with a view to their place in the overall statutory scheme," *Davis*, 489 U.S. at 809, and "fit[s], if possible, all parts into an harmonious whole," *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959). Second, the Court considers the significance of "statutory history," including statutory amendments that materially alter the terms of the provision at issue. *Booth v. Churner*, 532 U.S. 731, 739-41 (2001); *see Burgess v. United States*, 128 S. Ct. 1572, 1579-80 (2008). And third, when interpreting criminal statutes, the Court "assume[s] Congress acted against certain background understandings set forth in judicial decisions." *Dixon v. United States*, 548 U.S. 1, 17 (2006) (Kennedy, J., concurring); *see United States* v. *Jimenez Recio*, 537 U.S. 270, 274-76 (2003).

Those contextual considerations establish that the court of appeals fundamentally erred in its interpretation of Section 843(b). In particular, (i) the court's interpretation undermines Congress's considered decision to treat a drug user's simple possession as a "misdemeanor" rather than a "felony"; (ii) it cannot be reconciled with Congress's narrowing of the reach of Section 843(b) from facilitation of any drug "offense" to facilitation only of a drug "felony"; and (iii) it is inconsistent with the long-settled background understanding that a person who buys drugs does not thereby aid or abet his seller's distribution of the drugs to him. Those three considerations together establish that Section 843(b) fails to reach a person's use of a phone to obtain drugs for his own

personal use. Such a person may use a phone in "facilitating" a "misdemeanor," but not in "facilitating" a "felony."[3]

A. Interpreting Section 843(b) To Reach Persons Who Buy Drugs For Personal Use Would Be Fundamentally Inconsistent With Congress's Treatment Of Simple Possession As A Misdemeanor

1. a. Before 1970, the federal drug laws drew no salient distinction between drug traffickers and drug users. The drug laws instead contained general prohibitions imposing substantial penalties on both traffickers and users, treating both as felons. *See, e.g.*, 21 U.S.C. § 174 (1964) (repealed) (making it a felony to "receive[]," "buy[], sell[], or in any manner facilitate[] the . . . sale of" narcotic drugs known to be imported, and providing that "possession of the narcotic drug" constitutes "sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury"); *id.* (prescribing sentence of 5 to 20 years of imprisonment for first offense of selling or receiving any quantity of narcotics); *id.* § 176a (1964) (repealed) (same, for marijuana).

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[3] In certain situations involving aggravating circumstances explicitly set forth in the simple possession statute (*viz.*, when the person has a prior drug conviction or the drug possessed is cocaine base or flunitrazepam), possession for personal use constitutes a felony rather than a misdemeanor. *See* 21 U.S.C. § 844(a). Because the predicate offense in such situations would be a felony, the use of a phone to facilitate it may fall within the reach of Section 843(b). *See United States v. Williams*, 176 F.3d 714, 717 & n.3 (3d Cir. 1999) (Alito, J.). Statements in this brief to the effect that possession of drugs for personal use is a misdemeanor should be understood to refer to situations not involving those aggravating circumstances.

b. In its comprehensive revisions to the federal drug laws in the Controlled Substances Act of 1970 (CSA), Pub. L. No. 91-513, Tit. II, 84 Stat. 1236 (1970), Congress radically changed its approach by drawing a fundamental distinction between drug traffickers and drug users. With respect to traffickers, Congress made it a felony to manufacture, distribute, or dispense, or possess with intent to distribute, manufacture or dispense, a controlled substance, 21 U.S.C. § 841(a)(1), and prescribed progressively steeper penalties for those offenses based on the nature and quantity of the drugs involved, *see* 21 U.S.C. § 841(b). With respect to drug users, in stark contrast, Congress established a new offense, simple possession of a controlled substance—*i.e.*, possession solely for personal use rather than for distribution—and defined that offense as a misdemeanor subject to a term of imprisonment of no more than one year for first-time offenders. CSA § 404(a) (codified at 21 U.S.C. § 844(a)); *see* H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4577 (under the CSA, illegal possession "by an individual for his own use is a misdemeanor").

Consequently, whereas Congress had previously treated possession for personal use no differently from possession for distribution, and as a felony subject to stiff penalties, Congress in the CSA singled out possession for personal use for markedly favorable treatment as a misdemeanor. The decision to make "the illegal possession of a controlled drug for one's own use . . . a misdemeanor" rather than a felony was considered "[o]ne of the most striking features of the new penalty structure" established by the CSA. 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland).

Congress devoted considerable attention to the contours of the new misdemeanor offense of simple possession, and reinforced its intention to afford lenient treatment to users who possess drugs solely for their own use. Congress enabled persons with no prior drug convictions who are found guilty of simple possession to avoid a judgment of conviction altogether and gain a dismissal of the proceedings upon successfully completing a probationary term of up to one year. CSA § 404(b)(1), 84 Stat. at 1264 (codified as amended at 18 U.S.C. § 3607(a)). Congress also afforded any such person under the age of 21 an opportunity to obtain an order expunging all official records of his arrest, indictment, or trial, in order "to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment." *Id.* § 404(b)(2), 84 Stat. at 1264 (codified as amended at 18 U.S.C. § 3607(c)). Those provisions "reflect[ed] the judgment of most authorities that harsh penalties imposed on the user have little deterrent value and often ruin the life of an individual involved." 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland).

By treating simple possession as a misdemeanor and affording first-time offenders the opportunity to avoid any judgment of conviction by satisfying probation conditions, Congress manifested its judgment that a drug user not only commits an offense far less serious than a drug trafficker, but also should be afforded a chance for rehabilitation. The upshot of Congress's sharp distinction between drug trafficking and drug use therefore is a conclusion that "[t]he illegal traffic in drugs should be attacked with the full power of the federal government" and the "price for participation in this traffic should be prohibitive."

H.R. Rep. No. 91-1444, *supra*, *reprinted in* 1970 U.S.C.C.A.N. at 4575. At the same time, "[t]he individual user should be rehabilitated," so much so that, even when he receives a sentence of imprisonment, "the rehabilitation of the individual, rather than retributive punishment, should be the major objective." *Id.*

c. The terms of the newly enacted provisions governing drug traffickers and drug users themselves make clear Congress's intention to punish traffickers but to rehabilitate users. That understanding is reinforced by the legislative record of the 1970 amendments. That record is replete with statements by the legislation's proponents confirming the intent to impose stiff penalties on drug traffickers while emphasizing rehabilitation of drug users.

One Senator, for example, described the legislation as marking "a clear distinction between those who use drugs and those abominable bloodsuckers who traffic in them." 116 Cong. Rec. 1011 (1970) (statement of Sen. Young). He further observed that the "tough sentences for mere users have made rehabilitation difficult." *Id.* Another Senator stated that, "[i]n the past we have often imposed severe punishment on the victim of the drug traffic, while the criminal trafficker has remained beyond our reach." *Id.* at 995 (statement of Sen. Dodd). In contrast, "[t]he new law will impose severe punishment for the professional criminal in the drug trade, but provide more flexible penalties for the less serious drug offenders." *Id.* And another Senator explained that, "for those who are users but not pushers . . . the emphasis should be prevention and rehabilitation, not simply throwing them in jail." *Id.* at 35,478 (1970) (statement of Sen. Kennedy).

Supporters in the House echoed those sentiments. One Representative, for instance, observed that the legislation establishes "a distinction between the unfortunate user or addict of narcotics and . . . [t]he dealer or pusher who reaps huge financial benefits from the misery of the user." 116 Cong. Rec. 33,647 (1970) (statement of Rep. Sisk). Making "possession of controlled drugs by an individual for his personal use a misdemeanor" thus "reflects humane and knowledgeable assessment of the problem," in that "harsh penalties for the user or addict present no deterrent whatsoever and do little to solve the overall problem." *Id.* Another Representative explained that the legislation punishes offenders guilty of the "manufacture, distribution, and sale of dangerous drugs" with "stiff sentences," but "recognizes that the mere use of dangerous drugs is more of a sickness" and that those who "merely use or possess drugs for their own use, and who are caught, should not have their futures ruined." 116 Cong. Rec. 33,307 (1970). (statement of Rep. Robison).

2. Because the Court interprets Section 843(b) as part of an "overall statutory scheme," *Davis*, 489 U.S. at 809, it should construe the provision's reach against the backdrop of Congress's considered determination in the CSA to draw a fundamental distinction between drug traffickers and drug users. When interpreted in light of Congress's judgment to treat drug users as misdemeanants and promote their rehabilitation, Section 843(b) cannot be construed to apply to persons who buy drugs solely for their own personal use. Section 843(b) constitutes a felony offense carrying a sentence of up to four years of imprisonment for each conviction. Moreover, "[e]ach separate use of a communication facility"

constitutes "a separate offense," even if all uses relate to a single underlying transaction. 21 U.S.C. 843(b). Accordingly, if a person is party to four phone conservations, e-mails, or text messages in connection with a single purchase of drugs for his own personal use, he would face a sentence of up to 16 years of imprisonment, no matter how minimal the quantity of drugs involved in the transaction.

Applying the harsh consequences of Section 843(b) against drug *traffickers* coheres with Congress's objective in the CSA to visit stringent penalties on those who benefit financially from the distribution of drugs. But applying Section 843(b) against drug *users* who seek drugs solely for their own use would substantially undermine Congress's decision to draw a fundamental distinction between traffickers and users, and to emphasize rehabilitation rather than punishment of the latter. Instead of facing a maximum sentence of one year of imprisonment with the possibility of avoiding any judgment of conviction at all by completing probation, a buyer of drugs solely for his own use would face the prospect of four years of imprisonment simply because he exchanged a phone call, e-mail, or text message in arranging the purchase. And if he happened to exchange multiple phone calls or messages to complete the purchase, he would face an additional four years of imprisonment for each one. It defies common sense to suppose that Congress would intend that an addicted user—let alone a first-time youthful experimenter—face 8 years of imprisonment because he made two phone calls to arrange a drug purchase, particularly when the same person would face only a misdemeanor conviction (or probation with no con-

viction at all) if he made exactly the same purchase face-to-face.

Even if drug users regularly obtained drugs in unplanned, face-to-face interactions without any prior phone or electronic communication, Congress could not be considered to have cast aside its basic objective to minimize drug users' sentences and promote their rehabilitation merely because they use a phone in arranging the transaction. In fact, moreover, "the use of a telephone by those engaged in narcotics transactions" has long been "very common." *United States v. Dotson*, 871 F.2d 1318, 1326 (6th Cir. 1989) (Guy, J., concurring), *amended on other grounds by* 895 F.2d 263 (6th Cir. 1990). And the use of communication devices in drug transactions has become all the more prevalent with the ever-growing reliance on cellular telephones, e-mail devices, and text messaging in everyday interactions. For any drug addict or teenage experimenter who exchanges a cellular phone call or electronic message when obtaining drugs for personal use—as would be utterly commonplace—the court of appeals' interpretation would override Congress's considered decision elsewhere in the statute to minimize the user's sentence and promote his rehabilitation, and would instead expose him to harsh sentences aimed at deterrence and retributive punishment.

That interpretation fails to construe Section 843(b) as part of "a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), that "fit[s], if possible, all parts into an harmonious whole," *Mandel Bros.*, 359 U.S. at 389. The court of appeals' interpretation instead would transform Section 843(b) into a statutory anomaly that works at cross purposes with the re-

mainder of the statutory scheme. "To hold that persons who merely buy drugs for their personal use are on equal footing with distributors by virtue of the facilitation statute would undermine" Congress's "statutory distinction" between drug traffickers and drug users. *Martin*, 599 F.3d at 889. And to say that Congress sought to make "actual possession of one gram of cocaine" a misdemeanor, but "use of the phone to obtain the cocaine" a felony, simply "makes no sense." *Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting).

The discord between the court of appeals' interpretation of Section 843(b) and Congress's objectives in the overall statutory scheme becomes especially pronounced upon recognition that both the person who initiates a telephone call and the person who answers it "use" a telephone. Consequently, the purchaser of a small quantity of drugs for personal use could be charged with a felony if he *received* a call offering him the drugs, even if he at no point initiated any call affirmatively seeking drugs. Indeed, the government could itself convert the purchaser's misdemeanor offense into a felony under Section 843(b) by placing an undercover call offering him drugs. *See, e.g.*, *United States v. McLernon*, 746 F.2d 1098, 1107 (6th Cir. 1984) ("A violation of § 843(b) may be found . . . even when the defendant does not initiate the calls."); *United States v. Cordero*, 668 F.2d 32, 43 n.16 (1st Cir. 1981) (Breyer, J.) ("We are aware of no authority which suggests the term 'use' in the statute refers solely to 'placing' calls and leaves unpunished use of the telephone by the receiver of a call."); *United States v. Arias-Villanueva*, 998 F.2d 1491, 1509 (9th Cir. 1993) ("'Use' of a telephone to facilitate the commission of a crime occurs

at both ends of the line."), *abrogated in part on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995).

This case illustrates that the court of appeals' interpretation of Section 843(b) stands fundamentally at odds with Congress's basic objectives in the federal drugs laws. There is no suggestion that petitioner has ever engaged in drug trafficking or has been anything more than a drug user. Congress in that situation sought to emphasize rehabilitation rather than retribution. Yet the government charged petitioner with six felony counts of violating Section 843(b) and exposed him to a lengthy term of imprisonment, and the court of appeals upheld multiple felony convictions against him, because he used a phone in obtaining 2 grams of cocaine for his own personal use. The better approach, and the one more in keeping with the overall statutory scheme, would entail holding that petitioner's use of a phone at most facilitated his misdemeanor possession for personal use, and did not also facilitate his seller's felony distribution of the drugs to him.

B. By Narrowing Section 843(b)'s Scope From Facilitation Of Drug "Offenses" To Facilitation Only Of Drug "Felonies," Congress Excluded Misdemeanor Purchasers For Personal Use From The Provision's Reach

When Congress enacted the CSA in 1970, it did more than distinguish between drug traffickers and users in a way that compels excluding the purchase of drugs for personal use from the reach of Section 843(b). It also narrowed the scope of Section 843(b) itself from facilitation of any drug "offense" to facili-

tation of a drug "felony." That "statutory history" confirms Congress's intention to treat the purchase of drugs for personal use as facilitating only the buyer's own misdemeanor possession, not the seller's felony distribution. *See Booth v. Churner*, 532 U.S. 731, 739-41 (2001); *Burgess v. United States*, 128 S. Ct. 1572, 1579-80 (2008).

1. The original version of Section 843(b) prohibited the use of a communication facility in facilitating "any act or acts constituting an *offense*" punishable under certain provisions of the drug laws. Narcotic Control Act of 1956 § 201, 70 Stat. at 573 (codified at former 18 U.S.C. § 1403 (repealed)) (emphasis added). At that time, all such "offenses"—including buying, selling, and receiving imported marijuana or narcotics—constituted felonies. *See id.* §§ 103, 105-08, 70 Stat. at 568, 570-71 (codified at former 21 U.S.C. §§ 174 (repealed), 184a (repealed); 26 U.S.C. § 7237 (repealed)).

Because any receipt of drugs constituted an offense, a person who used a phone to purchase drugs for personal use was guilty of using the phone in facilitating or committing his own receipt offense. Consistent with that understanding, the government could use the original communication facility statute to prosecute drug users who made telephone calls to arrange the purchase of small quantities of drugs for personal use. *See United States v. Butler*, 204 F. Supp. 339, 340-41, 344 (S.D.N.Y. 1962).

2. When Congress enacted the CSA in 1970, it did more than downgrade drug possession for personal use from a felony to a misdemeanor through the new offense of simple possession. In an immediately adjacent provision of the CSA, Congress also

simultaneously—and correspondingly—confined the reach of Section 843(b). Whereas the provision previously encompassed use of a communication device in facilitating any drug "offense," Congress restricted it to reach use of a communication device in facilitating only a drug "felony." CSA § 403(b), 84 Stat. at 1263 (codified at 21 U.S.C. § 843(b)). Thus, in immediately neighboring provisions, Congress simultaneously (i) downgraded possession for personal use from a felony to a misdemeanor, (ii) decriminalized simple possession altogether if the user successfully completes a probationary period, and (iii) narrowed the facilitation statute from a prohibition against using a phone in facilitating an "offense" to a prohibition against using a phone in facilitating a "felony." *See* CSA §§ 403(b), 404(a), (b), 84 Stat. at 1263, 1264-65.

The coordinated nature of those changes demonstrates that Congress narrowed Section 843(b) from facilitating an "offense" to facilitating a "felony" in order to exclude the newly created class of misdemeanant simple possessors from Section 843(b)'s reach. Had Congress not made the change from "offense" to "felony," persons who use a phone to purchase drugs for personal use could be prosecuted for using a phone in facilitating their own misdemeanor "offense" of simple possession, just as such persons had been subject to prosecution under the previous version of Section 843(b). By changing "offense" to "felony," Congress eliminated that possibility. When a person uses a phone to commit his own offense of simple possession, he facilitates at most a "misdemeanor," not a "felony," and he therefore falls outside the reach of the new version of Section 843(b).

The court of appeals' contrary interpretation rests on the view that, whenever a person facilitates his own misdemeanor possession of drugs for personal use, he necessarily also facilitates the dealer's "felony" distribution of the drugs to him. But that interpretation would render Congress's deliberate change from facilitating an "offense" to facilitating a "felony" of no practical effect in the very class of cases that was foremost in Congress's mind—*i.e.*, cases in which a drug user possesses drugs solely for his own personal use. *See* pp. 14-18, *supra*. That interpretation therefore must be rejected.

C. The Principle That A Buyer Of Drugs Does Not Aid Or Abet His Seller's Distribution Applies To Section 843(b)

Congress is assumed to have enacted Section 843(b) against "background understandings set forth in judicial decisions," *Dixon*, 548 U.S. at 17 (Kennedy, J., concurring); *see Jimenez Recio*, 437 U.S. at 274-76, and one such understanding of particular relevance holds that a buyer of contraband does not aid or abet his dealer's unlawful sale. Because the term "facilitat[e]" in Section 843(b) is equivalent to the term "aid or abet," that settled principle applies to Section 843(b). A buyer of drugs for personal use thus neither "aids or abets" nor "facilitates" his dealer's "felony" distribution.

1. It has long been settled that a buyer of contraband cannot be prosecuted as "a party to the crime of illegal sale." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(e), at 371 (2d ed. 2003). That principle appears to have originated as a response to Prohibition-era efforts by prosecutors to charge buyers of liquor as aiders or abettors of their sellers' illegal

sales. Courts uniformly held that buyers could not be charged with that offense. *See Lott v. United States*, 205 F. 28, 29-31 (9th Cir. 1913) (citing 15 decisions to that effect).

Some courts reasoned that charging buyers with aiding or abetting would circumvent the legislature's intent to punish the seller, but not the buyer. *E.g.*, *Lott*, 205 F. at 29-30 (citing *Wakeman v. Chambers*, 28 N.W. 498, 499 (Iowa 1886)). Others reasoned that an aider or abettor "must stand in the same relation to the crime as the criminal—approach it from the same direction." *Id.* at 30 (quoting *State v. Teahan*, 50 Conn. 92, 101 (1882)). And still others asserted simply, "[t]hat such a prosecution is unprecedented in this State shows very strongly what has been understood to be the law upon the subject." *Id.* at 30 (quoting *State v. Rand*, 51 N.H. 361, 367 (1871) (internal quotation marks omitted)). Whatever its precise rationale, the principle that a buyer does not aid or abet a seller's unlawful sale became—and remains—firmly entrenched.

This Court relied on that principle in *Gebardi v. United States*, 287 U.S. 112 (1932). The statute at issue in *Gebardi* subjected to criminal punishment a person who transported a woman for the purpose of prostitution. The Court concluded that a woman could not be convicted of aiding or abetting the person who transported her because the statute singled out the transporter for punishment; and a woman's assistance, the Court reasoned, was a common incident of the transporter's offense. *Id.* at 119. The Court drew support for its conclusion from the established rule that a purchaser of liquor could not be prosecuted as an aider or abettor of an illegal sale. Specifically, the Court reasoned that a woman who is

transported for the purpose of prostitution could no more be prosecuted under "general language punishing those who aid and assist the transporter," than a "purchaser of "liquor" could be prosecuted "as an abettor of the illegal sale." *Id.*

Consistent with that established buyer-seller principle, federal courts have held that a buyer of drugs for personal use cannot be convicted of aiding or abetting his dealer's distribution under 18 U.S.C. § 2, the general aiding and abetting statute. In *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977), the Second Circuit expressly "reject[ed] the government's suggestion" that a person "who receives the drug for personal use" is "liable as an aider and abettor of the agent's distribution to him." The court explained that, "under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his possession." *Id.* Similarly, in *United States v. Harold*, 531 F.2d 704, 705 (5th Cir. 1976), the Fifth Circuit "reject[ed] out of hand the government's contention that because Harold went to the airport 'for a fix' he is guilty as a recipient of aiding and abetting the distribution of heroin." Numerous state courts have applied the same principle in interpreting their own drug laws.[4]

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[4] *See Brown v. State*, 203 So. 2d 700, 702 (Ala. Ct. App. 1967); *Howard v. State*, 496 P.2d 657, 660 (Alaska 1972); *State v. Cota*, 956 P.2d 507, 509-10 (Ariz. 1998); *Sweatt v. State*, 473 S.W.2d 913, 914-15 (Ark. 1971); *People v. Mimms*, 110 Cal. App. 2d 310, 314 (1952); *State v. Ford*, 1996 WL 190783, at *3 (Del. Super. Ct. 1996); *Sobrino v. State*, 471 So. 2d 1333, 1335 (Fla. Dist. Ct. App. 1985); *Gamble v. State*, 62 S.E. 544 (Ga. Ct. App. 1908); *State v. Payton*, 45 Idaho 668, 670-71 (1928); *Wakeman v. Chambers*, 28 N.W. 498, 499 (Iowa 1886); *Dunaway v. Commonwealth*, 39 S.W.2d 242, 242 (Ky. Ct. App. 1931); *State v. Celestine*, 671 So. 2d 896, 897-98 (La. 1996);

These decisions reflect a consensus that "the act of purchasing a controlled substance does not make the buyer an accessory to the crime of distribution." 28 C.J.S. *Drugs and Narcotics* § 298 (2008); Joshua Dressler, *Understanding Criminal Law* § 30.09[D], at 461 (2d ed. 1995) ("[A] purchaser of narcotics is not an accomplice in the commission of a sale of the controlled substance."). The federal government appears to have acquiesced in that consensus. After the decisions in *Swiderski* and *Harold* rejected any suggestion that a purchaser of drugs aids or abets his seller's distribution, the government appears to have refrained from bringing any further prosecutions based on that theory.

2. That background understanding concerning aider-or-abettor liability applies to Section 843(b). Section 843(b) uses the term "facilitat[e]," and that term is synonymous with "aid or abet." For example, Black's Law Dictionary defines "aid and abet" as to

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Commonwealth v. Willard, 39 Mass. 476, 477-79 (1839); *State v. Tremont*, 200 N.W. 93, 94 (Minn. 1924); *State v. Wolfskill*, 421 S.W.2d 193, 197 (Mo. 1967); *State v. Lyons*, 838 P.2d 397, 399-401 (Mont. 1992); *State v. Utterback*, 485 N.W.2d 760, 770 (Neb. 1992), *overruled on other grounds by State v. Johnson*, 589 N.W.2d 108 (Neb. 1999); *Tellis v. State*, 445 P.2d 938, 940 (Nev. 1968); *State v. Pinson*, 895 P.2d 274, 276 (N.M. Ct. App. 1995); *People v. Ricci*, 298 N.Y.S.2d 637, 641 (County Ct. 1969); *State v. Burchfield*, 63 S.E. 89, 89 (N.C. 1908); *State v. Dwyer*, 172 N.W.2d 591, 596 (N.D. 1969); *State v. Morales*, 1986 WL 2679, at *5 (Ohio Ct. App. 1986); *Leigh v. State*, 246 P. 667, 667 (Okla. Crim. App. 1926); *State v. Nasholm*, 467 P.2d 647, 648 (Or. Ct. App. 1970); *State v. Fox*, 313 N.W.2d 38, 40 (S.D. 1981); *Brown v. State*, 557 S.W.2d 926, 926 (Tenn. Crim. App. 1977); *Robinson v. State*, 815 S.W.2d 361, 363-64 (Tex. App. 1991); *State v. Berg*, 613 P.2d 1125, 1126 (Utah 1980); *State v. Morris*, 896 P.2d 81, 84-85 (Wash. Ct. App. 1995); *Wheeler v. State*, 691 P.2d 599, 601-02 (Wyo. 1984).

"facilitate the commission of a crime." *Black's Law Dictionary* 76 (8th ed. 2004). And it in turn defines "facilitation" as the "act or an instance of aiding or helping; . . . the act of making it easier for another person to commit a crime." *Id.* at 627. The same essential definitions governed at the time of the original enactment of the communication facility provision in 1956 and of its amendment in the CSA in 1970. *See Black's Law Dictionary* 91 (4th ed. 1951) (defining "aid and abet" as "[h]elp, assist, or facilitate the commission of a crime"); *Black's Law Dictionary* 91 (rev. 4th ed. 1968) (same).

In accordance with their definitional equivalence, courts have equated "facilitate[e]" in Section 843(b) with "aiding or abetting" when applying the Sentencing Guidelines. For example, the career offender sentencing enhancement applies to felony convictions for controlled substance offenses, and initially, it expressly encompassed convictions for "aiding and abetting" a controlled substance offense but did not address whether it also encompassed Section 843(b) convictions for "facilitating" a controlled substance offense, U.S.S.G. §§ 4B1.1, 4B1.2 & app. note 1 (1996). Courts addressing the issue concluded that "using the telephone system in facilitating the distribution of narcotics *is equivalent to aiding and abetting that distribution.*" *United States v. Walton*, 56 F.3d 551, 556 (4th Cir. 1995) (emphasis added); *United States v. Mueller*, 112 F.3d 277, 282 (7th Cir. 1997) ("[A] defendant cannot be convicted of using a telephone to facilitate a drug offense unless the defendant also aids or abets, or attempts to commit, the drug offense itself.").[5] Courts have applied the

[5] The Sentencing Commission amended the career offender provision in 1997 to expressly encompass Section 843(b) convic-

same reasoning in holding that the sentencing enhancement in illegal reentry cases for a prior drug trafficking offense, U.S.S.G. § 2L1.2(b)(1)(A) (2008), encompasses Section 843(b) convictions for "facilitating" a drug trafficking offense. *See United States v. Jimenez*, 533 F.3d 1110, 1114 (9th Cir. 2008) ("'[F]acilitation' for purposes of § 843(b) amounts to the same thing as 'aiding and abetting.'"); *United States v. Orihuela*, 320 F.3d 1302, 1304 (11th Cir. 2003) ("[B]y facilitating that underlying offense, the accused aided and abetted that offense.").[6]

Because "aid or abet" and "facilitate" are definitional equivalents, the background principle that a buyer of drugs does not aid or abet his dealer's distribution directly applies here. Just as a buyer of drugs for personal use is not guilty of "aiding or abetting" his dealer's distribution for purposes of the aiding and abetting statute, 18 U.S.C. § 2(a), he also is not guilty of "facilitating" his dealer's distribution "felony" for purposes of Section 843(b). *See Binkley*, 903 F.2d at 1138 (Cudahy, J., dissenting). And because a buyer for personal use does not "facilitat[e]" his seller's "felony" distribution, his use of a phone to buy the drugs cannot constitute use of a communication device "in facilitating" his seller's drug "felony."

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tions. *See United States v. Jimenez*, 533 F.3d 1110, 1113 (9th Cir. 2008).

[6] In one other respect, the Sentencing Guidelines confirm the equivalence between "facilitation" in Section 843(b) and "aiding or abetting." Just as the base offense level for aiding or abetting an offense is the offense level for the underlying offense, *see* U.S.S.G. § 2X2.1 (2008), the base offense level for using a telephone in facilitating a drug felony is "the offense level applicable to the underlying offense," *see id.* § 2D1.6 (2008).

It bears emphasis in this regard that, even if a buyer of drugs could be conceived literally to "aid" his seller's illegal sale by making it possible, that literal possibility fails to govern the construction of 18 U.S.C. § 2(a). Instead, it gives way to the background understanding that a buyer of drugs does not aid or abet his seller's unlawful distribution. By the same token, even if a drug buyer could be conceived literally to "facilitate" his seller's "felony" distribution by making it easier—as the court of appeals assumed, Pet. App. 11a—the same background understanding dictates rejecting that literal possibility in favor of the rule that a buyer of drugs does not aid or abet (or, equivalently, facilitate) his seller's distribution. The settled rule for aider-or-abettor liability thus affords a strong foundation for concluding that the use of a phone to buy drugs for personal use may "facilitate" the buyer's misdemeanor possession, but not the seller's "felony" distribution.

3. In *Rewis v. United States*, 401 U.S. 808 (1971), the Court interpreted the term "facilitate" in a similar statutory context and reached a similar conclusion about its meaning. The statute at issue in *Rewis* prohibited "interstate travel with the intent to 'promote, manage, establish, carry on, *or facilitate* certain kinds of illegal activity," including gambling enterprises. *Id.* at 811 (quoting 18 U.S.C. § 1952) (emphasis added). The court of appeals held that patrons of an illegal gambling establishment were not guilty of "facilitating" the establishment, and this Court agreed. *Id.* The Court explained that "the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." *Id.*

When "Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). That principle applies here because the Travel Act and the facilitation statute share the common purpose of prohibiting conduct that facilitates an illegal enterprise. Consequently, just as the customers in *Rewis* did not "facilitate" an illegal gambling establishment within the meaning of the Travel Act, a customer of drugs does not "facilitate" his dealer's drug distribution within the meaning of Section 843(b). *See Martin*, 599 F.2d at 888-89 ("A difference in the nature of the illicit business should not change the basic principle enunciated by the Supreme Court [in *Rewis*] . . . that a mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress.").[7]

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[7] The government acknowledges that *Rewis* interpreted the term "facilitate" in the Travel Act not to reach a customer of the gambling enterprise. The government contends, however, that other language preceding that term in the statute clarified that "facilitate" in that provision excludes mere customers. Br. in Opp. 7-8 n.2. That argument acknowledges that the term "facilitate" in a statute need not encompass any person who literally makes a transaction "easier," and that context determines whether the term encompasses a mere customer. Here, as with the Travel Act, the context demonstrates that a mere drug customer falls outside the reach of Section 843(b). *See* pp. 14-32, *supra*.

D. The Remaining Arguments Of The Court Of Appeals And Government Fail To Withstand Scrutiny

1. In attempting to explain why Congress would have intended the use of a phone to transform a misdemeanor purchase for personal use into a felony, the court of appeals speculated that Congress might have been concerned that use of a phone helps drug users avoid detection. Pet. App. 12a. The court's speculation, however, cannot account for Congress's decision to narrow Section 843(b) to reach facilitation only of a drug "felony." If Congress in fact sought to impose increased penalties for use of the phone by drug users because of general concerns about their ability to avoid detection, Congress would have retained Section 843(b)'s prohibition against use of a phone to facilitate any drug "offense," rather than restrict it to prohibit facilitation only of a drug "felony." But with Congress having narrowed Section 843(b)'s reach to exclude facilitation of drug misdemeanors, the court of appeals' speculation about ease of detection affords no rationale for continuing to apply the provision to drug users who buy drugs solely for their own use.

Moreover, there is no evidence of a concern on the part of Congress that drug users would more readily evade detection by using a phone to purchase drugs, much less any indication of a belief that any such risk should be met with severe punishment of the kind allowed by Section 843(b). Congress in the CSA fundamentally shifted its approach and sharply distinguished between drug users and traffickers, seeking to rehabilitate users rather than to punish them. There is no basis for attributing to Congress a desire to revert to severe punishment of those drug users

who happen to use a phone because those users might thereby more easily avoid detection. That is particularly true because, when Congress created the misdemeanor offense of simple possession, it plainly would have understood that persons would commonly use a phone in committing that offense. Because there is "no [plausible] explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime," *United States v. Santos*, 128 S. Ct. 2020, 2027 (2008) (plurality opinion); *see id.* at 2033 (Stevens, J., concurring in the judgment), the court of appeals' interpretation should be rejected.

Finally, the legislative record demonstrates that Congress's animating concern, when originally enacting the communication facility provision, had nothing to do with drug users. Instead, Congress was concerned that major drug traffickers used telephones to orchestrate substantial drug deals without coming into contact with drug pushers, drug users, or the drugs themselves. In that way, major traffickers minimized the risk of their detection. *See* S. Rep. No. 84-1997, at 9 (1956) (describing "the covert nature of the narcotic traffic wherein the big supplier avoids all possible contact with the ultimate buyer and with the petty pusher or peddler"); *id.* ("[B]ig-time traffickers are seldom caught and convicted, because they . . . avoid all direct contact with the peddlers and ultimate buyers," and "[t]heir operations are almost entirely limited to the telephone."); *id.* at 10 (the "big operator[s] . . . use the telephone extensively, and it helps to conceal their identity"); 102 Cong. Rec. S9043 (May 25, 1956)

(statement of Sen. Daniel) ("[T]he big racketeers never touch the drugs. They place their orders . . . by telephone, and they deal with certain henchmen who handle the drug . . . ."). Congress's concerns about the use of a telephone by drug traffickers affords no grounds for construing Section 843(b) to reach the use of a phone by mere drug users, especially in view of Congress's efforts in the CSA to establish fundamentally distinct treatment of drug traffickers and drug users.

2. The government argues that excluding personal use purchases from Section 843(b) would denude the provision of any practical effect (Br. in Opp. 8), and would render the provision difficult to administer (*id.* at 9). Neither contention has merit.

a. Section 843(b) serves substantial governmental purposes that have nothing to do with the government's anomalous effort to apply the provision against drug users who use a phone in buying drugs for their own use. Because the provision is of substantial use to the government in other applications, there is no need to extend Section 843(b) to encompass the misdemeanor drug users whom Congress sought to exclude from the statute's reach.

The best evidence of the provision's practical significance to the government is the frequency with which the government uses it against drug traffickers. The government routinely seeks Section 843(b) convictions of drug traffickers based on a variety of underlying drug felonies. It prosecutes traffickers for using a phone in facilitating distribution of drugs;[8] in facilitating possession with intent to dis-

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[8] *E.g.*, *United States v. McFadden*, 523 F.3d 839, 840 (8th Cir. 2008) (per curiam); *United States v. Davis*, 929 F.2d 554,

tribute drugs;[9] and in facilitating conspiracies to distribute drugs, or to possess drugs with intent to distribute, manufacture, or import them.[10] The government also uses Section 843(b) violations as predicate crimes for continuing criminal enterprise offenses.[11]

Section 843(b) serves at least three important practical purposes in aid of the government's prosecution of drug traffickers. First, it enables the government to charge multiple felony counts in connection with a single predicate offense of distribution. As previously discussed, Section 843(b) prescribes

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556 (10th Cir. 1991); *United States v. Dotson*, 871 F.2d at 1320.

[9] *E.g.*, *United States v. Whitmore*, 24 F.3d 32, 34 (9th Cir. 1994); *Dotson*, 871 F.2d at 1320; *United States v. Rey*, 641 F.2d 222, 223 (5th Cir. 1981); *United States v. Jones*, 612 F.2d 453, 454, 457 (9th Cir. 1979); *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. 1981).

[10] *E.g.*, *United States v. Turner*, 528 F.2d 143, 149 n.1 (9th Cir. 1975) (per curiam); *United States v. Johnston*, 146 F.3d 785, 791 (10th Cir. 1998); *United States v. Reed*, 1 F.3d 1105, 1108-09 (10th Cir. 1993); *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991); *United States v. Smith*, 924 F.2d 889, 894 (9th Cir. 1991); *United States v. Briscoe*, 896 F.2d 1476, 1485 (7th Cir. 1990); *United States v. Thomas*, 586 F.2d 123, 129 (9th Cir. 1978); *United States v. Steinberg*, 525 F.2d 1126, 1128 (2d Cir. 1975); *United States v. Rodgers*, 755 F.2d 533, 538 (7th Cir. 1985); *United States v. Ward*, 696 F.2d 1315, 1319 & n.4 (11th Cir. 1983); *United States v. Barnes*, 681 F.2d 717, 719 (11th Cir. 1982); *United States v. Cordero*, 668 F.2d 32, 35 (1st Cir. 1981) (Breyer, J.); *United States v. Pool*, 660 F.2d 547, 561 (5th Cir. 1981); *United States v. Jones*, 839 F.2d 1041, 1046 (5th Cir. 1988).

[11] *E.g.*, *United States v. Zavala*, 839 F.2d 523, 527 (9th Cir. 1988) (per curiam); *United States v. Possick*, 849 F.2d 332, 334 (8th Cir. 1988); *United States v. Young*, 745 F.2d 733, 755 (2d Cir. 1984).

that each distinct communication constitutes "a separate offense," even if the communications relate to the same underlying offense. 21 U.S.C. § 843(b). Accordingly, if a drug trafficker makes three calls in connection with one predicate distribution, the government is free to charge three separate counts of facilitation, with each count carrying a penalty of up to four years of imprisonment. The government frequently takes advantage of this option and charges multiple phone facilitation counts in connection with a single predicate distribution.[12]

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[12] *E.g., United States v. de la Cruz Paulino*, 61 F.3d 986, 990-91 (1st Cir. 1995) (six facilitation counts for one distribution); *United States v. Serrano*, 57 Fed. Appx. 12, 15-16 (2d Cir. 2002) (per curiam) (two facilitation counts for one distribution); *United States v. Roberts*, 881 F.2d 95, 97-98, 102 (4th Cir. 1989) (seven 843(b) counts for one proposed transaction); *United States v. Goldman*, 750 F.2d 1221, 1222-23 (4th Cir. 1984) (seven facilitation counts for one distribution); *United States v. Medina*, 992 F.2d 573, 577-78, 588 (6th Cir. 1993) (five facilitation counts for one distribution); *United States v. Estrada*, 829 F.2d 1127, at *2, *5-*6 (6th Cir. 1987) (per curiam) (table) (two facilitation counts for one distribution); *United States v. Meyer*, 803 F.2d 246, 247 (6th Cir. 1986) (three facilitation counts for one distribution); *United States v. McLernon*, 746 F.2d 1098, 1104, 1106-07 (6th Cir. 1984) (twelve facilitation counts for one distribution); *United States v. Feekes*, 929 F.2d 334, 335, 337 (7th Cir. 1991) (five 843(b) counts for one distribution); *Binkley*, 903 F.2d at 1131-32, 1134-35 (two facilitation counts for one transaction); *United States v. Rollins*, 862 F.2d 1282, 1285-86 (7th Cir. 1988) (four facilitation counts for two distributions); *Andrews v. United States*, 817 F.2d 1277, 1278, 1281 (7th Cir. 1987) (three facilitation counts for one distribution); *United States v. McGuire*, 808 F.2d 694, 695 (8th Cir. 1987) (per curiam) (three facilitation counts for two distributions); *United States v. Tisor*, 96 F.3d 370, 373 (9th Cir. 1996) (five 843(b) counts for two distributions); *Johnston*, 146 F.3d at 788-89, 791 (10th Cir. 1998) (three facilitation counts for one conspiracy); *United States v. Davis*, 929 F.2d 554, 556-57, 559 (10th Cir.

Second, Section 843(b) gives the government a powerful plea bargaining tool. The government can offer a defendant who could be charged with conspiracy, distribution, or possession with intent to distribute, the opportunity instead to plead guilty to a Section 843(b) count. Because Section 843(b) carries a lower statutory maximum than the other offenses, a defendant in that position has a substantial incentive to accept the government's offer.

A number of commentators—including federal judges—have noted the government's reliance on Section 843(b) in the context of plea bargaining. *See* Hon. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me. L. Rev. 569, 571-72 (2005) (observing that "the same conduct might be characterized as the sale of drugs, a serious charge, or the more innocuous charge of use of a phone in a drug transaction" (citing § 843(b))); John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1122 (1995) ("The prosecutor can . . . control sentencing by charge bargaining. A major narcotics trafficker, for example, could be charged with only a four-year 'telephone count'—using a telephone to facilitate a drug deal."); Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentencing Including Data From the District Level*, 87 Iowa L. Rev. 477, 523 (2002) (describing various

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1991) (two facilitation counts for one distribution); *United States v. Budd*, 23 F.3d 442, 443-44 (D.C. Cir. 1994) (two facilitation counts for one distribution); *United States v. Whoie*, 925 F.2d 1481, 1481-82 (D.C. Cir. 1991) (Thomas, J.) (six facilitation counts for three distributions).

kinds of charge bargaining in federal drug cases, including "substituting for substantive drug offenses a plea to use of a communication facility to carry out a drug trafficking offense under 21 U.S.C. § 843(b)"); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 121 & n.159 (2003) (noting that a Section 843(b) charge "is often used in cases in which a very favorable plea is offered to resolve a more serious drug charge"); Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1121-22 (2001) ("any defendant who pleads guilty only to a phone count is likely to have received an immense break because the statutory maximum sentence for this offense is four years, a term that will often be years less than the guideline sentence to which the defendant would be subject if charged with a trafficking crime").

Finally, by bringing a Section 843(b) charge, the government affords the jury an additional option to return a finding of guilt in circumstances in which it may be reluctant to find the defendant guilty of the predicate offenses. This Court's decision in *United States v. Powell*, 469 U.S. 57 (1984), involved precisely such a situation. There, the jury acquitted the defendant of conspiracy to possess with intent to distribute and possession with intent to distribute cocaine, but nonetheless convicted him of multiple counts of using a phone in facilitating those felonies. *Id.* at 60. This Court held that the convictions on the phone facilitation counts could stand even though the verdicts were inconsistent. *Id.* at 69.

b. Section 843(b) also is readily administrable when applied in the manner intended by Congress. Under a proper construction of Section 843(b), a jury would have to determine whether a defendant used a phone in purchasing drugs for personal use, or instead used a phone in purchasing drugs with the intent to distribute them. That inquiry is readily administrable.

In fact, the drug laws already draw a basic distinction between possession for personal use, *see* 21 U.S.C. § 844(a), and possession with intent to distribute, *see* 21 U.S.C. § 841(a), entirely without regard to Section 843(b). The government therefore routinely must prove that a defendant possessed drugs with the intent to distribute rather than for personal use whenever it charges possession with intent to distribute; and juries readily make that determination based on considerations such as the quantity of drugs and the defendant's statements. *See Swiderski*, 548 F.2d at 450. When deciding whether a defendant has used a phone in *facilitating* possession with intent to distribute, the jury would undertake precisely the same inquiry. The numerous Section 843(b) convictions obtained by the government for using a telephone to facilitate possession with intent to distribute demonstrate that the inquiry poses no obstacle to the government's legitimate enforcement interests.

E. Under The Rule Of Lenity, Any Ambiguity Concerning The Reach Of Section 843(b) Is Resolved In Favor Of Excluding Persons Who Purchase Drugs For Personal Use

To the extent there is any ambiguity concerning the applicability of Section 843(b) to persons who purchase drugs solely for their own personal use, the rule of lenity requires construing the provision to exclude such persons. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *id.* at 2033-34 (Stevens, J., concurring in the judgment); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-48 (1971). Under that rule, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis*, 401 U.S. at 812. "Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time honored interpretive guideline when the congressional purpose is unclear." *Liparota*, 471 U.S. at 427.

Here, consideration of all relevant factors demonstrates that Congress did not intend to include buyers for personal use within the ambit of Section 843(b). To the extent that "congressional purpose is unclear," however, the resulting "ambiguity" must be resolved in favor of construing Section 843(b) not to reach persons who use a phone to purchase drugs for personal use. *Liparota*, 471 U.S. at 427.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

RELEVANT STATUTORY PROVISIONS

1. Section 841(a) of Title 21 of the United States Code provides in relevant part:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Section 843(b) of Title 21 of the United States Code provides in relevant part:

> (b) Communication facility
>
> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals,

pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * * * *

(d) Penalties

(1) Except as provided in paragraph (2) [which provides for greater penalties in cases involving manufacture of methamphetamine], any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine under title 18, United States Code, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine under title 18, United States Code, or both.

3. Section 844 of Title 21 of the United States Code provides in relevant part:

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance

was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. * * * Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, if the conviction is a

first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams * * * . Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both.

4. Section 3607 of Title 18 of the United States Code provides:

(a) Pre-judgment probation.--

If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the

person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) Record of disposition.--

A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) Expungement of record of disposition.--

If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expunge-

ment order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

APPENDIX B

RELEVANT ACTS OF CONGRESS

1. The Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (July 18, 1956), provided in relevant part:

> Sec. 105. Importation, Etc., of Narcotic Drugs.
>
> Section 2(c) of the Narcotic Drugs Import and Export Act, amended (U.S.C., title 21, sec. 174), is amended to read as follows:
>
> "(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this subsection the defendant is shown to have

or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.["]

* * * * *

Sec. 201. Addition of New Chapter—Narcotics.

Part I of title 18 of the United States Code is amended by inserting after chapter 67 the following new chapter:

"Chapter 68—Narcotics

* * * * *

"§ 1403. Use of communications facilities—penalties.

"(a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in—

"(1) subsection (a) or (b) of section 7237 of the Internal Revenue Code of 1054

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. sec. 174), or

"(3) the Act of July 11, 1941, as amended (21 U.S.C. sec. 184(a),

shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.

"(b) For purposes of this section, the term 'communication facility' means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures and sounds of all kinds by mail, telephone, wire, radio or other means of communication.

2. The Controlled Substances Act of 1970, Pub. L. No. 91-513, Tit. II, 84 Stat. 1236 (Oct. 27, 1970), provided in relevant part:

PROHIBITED ACTS C—PENALTIES

Sec. 403. * * *

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes, mail,

telephone, wire, radio and all other means of communication.

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000 or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this title or title III or other law of the United Sates relating to narcotic drugs, marihuana or depressant or stimulant substances, have become final such persons shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000 or both.

PENALTY FOR SIMPLE POSSESSION; CONFIDENTIAL DISCHARGE AND EXPUNGING OF RECORDS FOR FIRST OFFENSE

Sec. 404. (a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this sub-

section have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(b)(1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this title or title III, or any other law of the United States relating to narcotic drugs, marihuana or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. * * *

RESPONDENT'S BRIEF

No. 08-192

In the Supreme Court of the United States

SALMAN KHADE ABUELHAWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner "use[d] [a] communication facility * * * in causing or facilitating * * * a felony" drug distribution, in violation of 21 U.S.C. 843(b), by using his cell phone to arrange with a drug dealer several purchases of cocaine for his own personal consumption.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 523 F.3d 415.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008. A petition for rehearing was denied on May 23, 2008 (Pet. App. 37a). The petition for a writ of certiorari was filed on August 13, 2008, and was granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of using a communication facility in causing or facilitating a felony drug distribution, in violation of 21 U.S.C. 843(b). He was sentenced to two years of probation and a $2000 fine. The court of appeals affirmed. Pet. App. 1a-18a.

1. In early 2000, federal agents began investigating Mohammed Said, a suspected cocaine dealer in Virginia. In June 2003, they obtained an order under 18 U.S.C. 2518 authorizing a wiretap on Said's cellular telephone. In the course of the wiretap, they intercepted a series of cell-phone conversations between petitioner and Said. Pet. App. 2a-3a.

On the night of July 5, 2003, the agents intercepted three calls. Petitioner initiated the first call and asked Said for a gram of cocaine. Said called petitioner back to ask where he was, and the two men agreed on a rendezvous point. During the third call, petitioner told Said that petitioner had arrived at the arranged location but that there were some other people there. To avoid detection, the two agreed on a different location. Pet. App. 4a-5a.

On the night of July 12, 2003, the agents intercepted three more calls. Petitioner initiated the first call and asked Said for another half-gram of cocaine. Nearly an hour later, petitioner again called Said, this time to increase his order to a full gram of cocaine and to ask where the two should meet. Said told petitioner to meet him at a butcher shop owned by Said's father. Petitioner agreed, indicating that he would be on his way immediately. About half an hour after the second call, Said—apparently nervous that the authorities would

detect the drug sale because he had been loitering near the butcher shop for too long—called petitioner back, asking where petitioner was and stating that "I really want to leave this place." Pet. App. 5a-6a. Petitioner responded: "I am coming to you man. One minute." *Id.* at 6a. Said relented and told petitioner to meet him at the restaurant next door to the butcher shop. *Ibid.*

Based on the intercepted calls, agents arrested petitioner. When questioned, petitioner admitted that he had long purchased cocaine from a man named Issam Khatib; that when Khatib quit the drug trade, Said assumed control of his customer base; that petitioner then began ordering cocaine from Said; and that petitioner regularly used his cell phone to place his orders with Said and to arrange the deliveries. Pet. App. 6a. Said pleaded guilty to conspiracy to distribute cocaine, and he was sentenced to 87 months of imprisonment. Presentence Investigation Rep. ¶ 7 (PSR).

2. A grand jury in the Eastern District of Virginia charged petitioner with seven counts of using a communication facility (his cell phone) in causing or facilitating Said's felony distribution of a Schedule II controlled substance (cocaine), in violation of 21 U.S.C. 843(b). That provision makes it unlawful "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony" in violation of the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* Count 1 of the indictment charged a June 29, 2003, call not at issue here, and the government dismissed it before trial. Counts 2 through 4 charged the three July 5 calls, and Counts 5 through 7 charged the three July 12 calls. Pet. App. 6a-7a.

Petitioner pleaded not guilty, and the case proceeded to trial. The government presented evidence pertaining to the telephone calls. At the close of the government's evidence, petitioner moved for a judgment of acquittal, arguing among other things that no rational juror could find him guilty because causing or facilitating a drug distribution by using a telephone "simply isn't a crime" when the telephone user buys the drugs for personal consumption. Pet. App. 20a. The district court denied the motion. *Id.* at 7a. It stressed that petitioner's conduct not only facilitated the felony distribution but also caused it. *Id.* at 21a-23a.

The jury found petitioner guilty on Counts 2 through 7. Pet. App. 7a. Petitioner again moved for a judgment of acquittal, reasserting his claim that "ordering personal use drugs on the telephone is not a violation of 21 U.S.C. 843(b)." C.A. App. 275. The district court again denied the motion. Pet. App. 7a, 33a-34a. The court sentenced petitioner to two years of probation and a $2000 fine. *Id.* at 7a-8a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Petitioner argued that Section 843(b) "is not violated when an individual facilitates the purchase of a drug quantity for personal use," since the purchase of cocaine for personal use is generally a misdemeanor, not a felony. *Id.* at 8a; see 21 U.S.C. 844. The court rejected that argument. The court noted that petitioner did not dispute that he had "used a communication facility (a cell phone) to arrange the drug transactions." Pet. App. 9a. Accordingly, the court reasoned that the case could "be decided by focusing only on whether [petitioner] facilitated the commission of a felony." *Ibid.* Giving the term "facilitate" its "common meaning"—namely, "to make easier or less difficult"—the court observed that

petitioner's "use of his cell phone undoubtedly made *Said*'s cocaine distribution easier." *Id.* at 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)). Because Said's distribution of cocaine to petitioner was a felony under 21 U.S.C. 841(a)(1), the court concluded that petitioner's use of his cell phone to help arrange the distribution fell squarely within the coverage of Section 843(b). Pet. App. 11a-13a.

In reaching that conclusion, the court of appeals emphasized that "[t]he statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated." Pet. App. 11a. The court therefore considered it "irrelevant" that petitioner's possession of cocaine for personal use was "not itself * * * a felony." *Id.* at 12a. As the court explained, Congress "had reason" to impose additional punishment—beyond punishment for simple possession—upon personal-use defendants who employ communication facilities such as cell phones to arrange drug transactions: "[U]se of communication facilities makes it easier for criminals to engage in their skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement." *Ibid.*

SUMMARY OF ARGUMENT

Under 21 U.S.C. 843(b), it is a felony "to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under" the Controlled Substances Act. The court of appeals correctly held that Section 843(b) is violated when a person uses a communication facility, such as a telephone, to purchase controlled substances from a drug dealer.

The court of appeals' interpretation is compelled by the plain language of Section 843(b). A dealer's distribu-

tion of drugs is a felony under the CSA, 21 U.S.C. 841, and a call to a dealer to purchase drugs both causes and facilitates the distribution. It causes the distribution because it effects it or brings it about—without an order from a purchaser, no distribution would take place. And it facilitates the distribution because it makes it easier, since the use of a communication facility allows the transaction to take place more efficiently and with less risk of detection.

In arguing that Section 843(b) is not violated when a drug purchaser uses a communication facility to obtain drugs for personal use, petitioner relies (Br. 25-31) on the principle of accessory liability recognized by this Court in *Gebardi* v. *United States*, 287 U.S. 112 (1932), that when a statute punishes only one party to a transaction that inevitably involves multiple actors, the other parties may not be punished for aiding and abetting the party whose conduct violates the statute. But while every drug distribution requires a drug receiver, not every drug distribution requires a receiver who uses a communication facility. Because a purchaser who uses a communication facility is not an inevitable participant in every drug distribution, *Gebardi* is inapplicable and does not justify declining to read Section 843(b) according to its terms.

Petitioner observes (Br. 14-15) that the receipt of drugs for personal use is ordinarily a misdemeanor, and he argues that it would be anomalous to treat a purchaser as a felon under Section 843(b) simply because he uses a communication facility to purchase drugs. Even if that were true, it would not justify petitioner's atextual reading of the statute; but in fact, there is nothing anomalous about applying Section 843(b) to purchasers. Not all drug possession is treated as a misdemeanor

under the CSA, and there are many circumstances in which even possessing or purchasing drugs for personal use is a felony. Congress could reasonably have determined that the use of a communication facility should be such a circumstance because it makes it easier for both parties to the transaction to avoid detection. In Section 843(b), as in several other statutes, Congress sought to protect the channels of communication from unlawful uses such as drug transactions. In doing so, it made no distinction between buyers and sellers.

Because the statutory text is clear, there is no need for recourse to legislative history. In any event, the legislative history does nothing to undermine the conclusion that Section 843(b) prohibits the use of a communication facility to purchase drugs. Petitioner suggests (Br. 15-18) that, because Congress lowered the penalty for simple possession when it enacted the CSA in 1970, it must have meant to exempt purchasers from the communication-facility statute. That claim finds no support in the CSA's legislative history. That history contains little discussion of Section 843(b), suggesting that Congress did not intend to alter the prior version of the statute, which applied to both buyers and sellers.

Finally, petitioner's reliance on the rule of lenity (Br. 40-41) is misplaced. The rule of lenity is inapplicable here because there is no grievous ambiguity in the statutory language. On the contrary, the plain language of Section 843(b) covers petitioner's conduct.

ARGUMENT

SECTION 843(b) PROHIBITS THE USE OF A COMMUNICATION FACILITY TO PURCHASE A CONTROLLED SUBSTANCE

A. The Plain Language Of Section 843(b) Applies To The Use Of A Communication Facility To Purchase A Controlled Substance

Section 843(b) makes it a felony "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under" the CSA. The term "communication facility" is defined to include a telephone, see 21 U.S.C. 843(b), and the distribution of a controlled substance in schedule I, II, III, or IV—such as cocaine, heroin, or marijuana—constitutes a felony under the CSA, see 21 U.S.C. 841(a)(1) and (b). Thus, under the terms of the statute, any person who uses a telephone in causing or facilitating the distribution of such a controlled substance violates Section 843(b). And a person who uses a telephone in purchasing a controlled substance violates both components of that provision.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In a case where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). This is such a case, because, by its plain language, Section 843(b) prohibits the use of a telephone to purchase a controlled substance.

1. Using a communication facility to purchase a controlled substance "causes" the commission of a felony under the CSA

When a person uses a communication facility to purchase a controlled substance, he or she uses the facility to cause an act of distribution. In ordinary usage, to "cause" means to bring about. *Webster's Third New International Dictionary of the English Language* 356 (1993) (*Webster's*) ("to serve as cause or occasion of"); see *ibid.* (defining "cause," in its noun form, as something that "brings about an effect or that produces or calls forth a resultant action"); *Random House Dictionary of the English Language* 330 (2d ed. 1987) (*Random House*) ("to be the cause of; bring about"); *Black's Law Dictionary* 235 (8th ed. 2004) (*Black's*) ("[t]o bring about or effect"). And in this case, the district court instructed the jury, without objection from petitioner, that "[t]o cause something to happen, obviously, that's an ordinary English language word[], simply means to help bring it about." C.A. App. 250. Someone who calls a drug dealer to arrange a purchase of drugs brings about an act of distribution by the dealer and thereby uses the telephone to cause a distribution.

Petitioner argues (Cert. Reply Br. 10-11) that, because the court of appeals held that petitioner's use of a telephone to purchase cocaine "facilitated" a felony under the CSA, "the case comes to this Court solely as a facilitation case." But the "causing" component of the statute was charged in the indictment, C.A. App. 10-16, and the district court found the government's evidence sufficient to meet it, Pet. App. 22a-23a ("I really don't have a problem in finding that at least a cause prong is met when a purchaser calls. If I call L.L. Bean and order a shirt, * * * I caused L.L. Bean to ship a shirt to

me."). It was also argued to the jury by government counsel, *id.* at 26a-27a, and the government briefed it in the court of appeals, Gov't C.A. Br. 28-29. Because this Court may affirm the judgment of the court of appeals "on any ground properly raised below," there is no barrier to considering the "causing" component of Section 843(b) in this case. *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994).

2. Using a communication facility to purchase a controlled substance "facilitates" the commission of a felony under the CSA

A person who uses a communication facility to purchase a controlled substance also uses the facility to facilitate a distribution. As the court of appeals observed, the "common meaning" of "facilitate" is "to make easier or less difficult." Pet. App. 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)); see *Webster's* 812 ("to make easier or less difficult"); *Random House* 690 (same); *Black's* 627 ("[t]o make the commission of a crime easier"). And the district court in this case instructed the jury, again without objection from petitioner, that "[t]he term 'to facilitate the commission' means to assist or help someone to do something or in some way make the task less difficult." C.A. App. 250. The use of a communication facility, such as a telephone, in a drug transaction allows the transaction to take place more efficiently, and with less risk of detection, than if the purchaser and seller had to meet in person. It therefore facilitates the distribution that occurs as part of that transaction.

a. Amicus National Association of Criminal Defense Lawyers (NACDL) argues that, in ordinary usage, a purchaser's use of a telephone would not be said to "facilitate" the drug-distribution offense. In its view (NACDL

Br. 10-11), if a "shopper * * * used the phone or the Internet to facilitate his own shopping," "he would not have used them to facilitate [the retailer's] operations," because "we all recognize that shoppers do not 'facilitate' a retailer's operations—they patronize it." That is incorrect. While it may not be common to speak of customers or purchasers "facilitating" the operations of a seller—perhaps because most purchasers do not have the *purpose* of facilitating a seller's activities—such usage is certainly consistent with the ordinary understanding of the word "facilitate." More to the point, whether or not one would say that the customers themselves facilitate the seller's operations, it is not at all strange to say that a customer's *use* of something, such as a credit card, a telephone, or the Internet, would facilitate an individual sale. Section 843(b) speaks in just such terms, making it unlawful "to use any communication facility in * * * facilitating" a drug felony.

b. Petitioner errs in arguing (Br. 31-32) that *Rewis* v. *United States*, 401 U.S. 808 (1971), establishes that "a customer of drugs does not 'facilitate' his dealer's drug distribution." In *Rewis*, this Court interpreted the Travel Act, 18 U.S.C. 1952, which prohibits interstate or foreign travel or the use of an instrumentality of interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate" certain kinds of "unlawful activity." 18 U.S.C. 1952(a)(3). "Unlawful activity" is defined to include a "business enterprise" involving gambling or prostitution; it also includes individual offenses, such as "extortion, bribery, or arson" in violation of state or federal law. 18 U.S.C. 1952(b). The Court in *Rewis* held that a gambler who crossed state lines to be a customer of a gambling business enterprise did not violate the Travel Act. 401 U.S. at 811. The

Court explained that the "intent to 'promote, manage, establish, carry on, or facilitate'" language in the Travel Act "suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." *Ibid.* The Court buttressed its brief textual analysis by noting the absence of a mention of customers in the legislative history; the degree to which inclusion of them "would alter sensitive federal-state relationships"; and the rule of lenity. *Id.* at 811-812.

Petitioner's reliance on *Rewis* is misplaced, because there are significant differences between the Travel Act and Section 843(b). First, because the Travel Act requires an intent to facilitate unlawful activity, it suggests an inquiry into "the traveler's purpose." *Rewis*, 401 U.S. at 811. The Court in *Rewis* had no occasion to hold—and did not hold—that interstate travel by the customers of a gambling enterprise does not facilitate the operation of the enterprise. Instead, it held only that the customers do not have the *intent* to facilitate the enterprise. Section 843(b), by contrast, does not require intent to facilitate. It applies to anyone who "knowingly or intentionally" uses a communication facility in facilitating the commission of a drug felony.

Second, in *Rewis*, the meaning of the word "facilitate" depended in large measure on the terms that preceded it ("promote, manage, establish, carry on"), all of which are more restrictive than "caus[e]," the word that appears in conjunction with "facilitate" in Section 843(b). The meaning of a particular statutory term may be broadened or narrowed "by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008). Here, the use of the word

"cause" indicates that "facilitate" carries a broader meaning than it has in the context of the Travel Act.

Third, while the Travel Act criminalizes the use of a facility of interstate commerce to facilitate the carrying on of a business enterprise involving gambling, illegal liquor, drugs, or prostitution, it does not cover facilitation of individual instances of such activities that are not part of a business enterprise. See, *e.g.*, *United States* v. *Pollock*, 926 F.2d 1044, 1050 (11th Cir.) (proof of a "continuous course of conduct" required to establish that a "business enterprise" was involved in a Travel Act violation), cert. denied, 502 U.S. 985 (1991); *United States* v. *Muskovsky*, 863 F.2d 1319, 1327 (7th Cir. 1988) (a "business enterprise" requires "more than isolated, casual, or sporadic activity"), cert. denied, 489 U.S. 1067 (1989). By contrast, the CSA does cover individual drug transactions. It may be odd to say that a customer facilitates the continuous course of conduct of the business enterprise that he or she patronizes, but it is much more natural to say that the customer who makes specific arrangements for a transaction over the telephone facilitates that individual transaction.

Petitioner is therefore incorrect when he relies on (Br. 32) the principle that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005). The predecessor of Section 843(b) was enacted several years before the Travel Act—and thus well before this Court's decision in *Rewis* interpreting the Travel Act. See Narcotic Control Act of 1956, ch. 629, § 201, 70 Stat. 573; Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498. The

two statutes do not have closely related purposes. And most importantly, the language of the two statutes is not similar in the relevant sense, because although they both use the word "facilitate," they do so in very different contexts.*

B. Principles Of Accessory Liability Do Not Support Petitioner's Interpretation

Petitioner argues that someone who uses a communication facility to purchase drugs does not violate Section 843(b) if the drugs are to be used for personal consumption. Under 21 U.S.C. 844(a), first-offense possession of personal-use quantities of most controlled substances is a misdemeanor, and petitioner contends that Congress could not have meant to impose additional, felony punishment on purchasers for using a communication facility to arrange the transactions through which they obtain drugs. Petitioner does not suggest that the text of Section 843(b) contains any provision that would exempt purchasers for personal use, and it does not. Instead, he argues (Br. 25-32) that this Court should recognize an atextual exception for any person who uses a telephone to purchase drugs for personal use because, he says, a buyer cannot aid or abet a distribution offense.

Petitioner's argument relies on the principle, recognized by this Court in *Gebardi* v. *United States*, 287 U.S. 112 (1932), that "a buyer of contraband cannot be prosecuted as 'a party to the crime of illegal sale,'" or for aiding and abetting the sale. Pet. Br. 25 (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(c) at 371 (2d ed. 2003) (LaFave)). That principle, however, has no application to Section 843(b).

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* Of course, *Rewis* is also entirely irrelevant to liability for *causing* a drug felony, in violation of Section 843(b).

1. In *Gebardi*, this Court reversed a conviction for conspiracy to violate the Mann Act, ch. 395, § 2, 36 Stat. 825, which made it unlawful to "transport * * * any woman or girl for the purpose of prostitution." The Court concluded that a woman who was transported in violation of the statute could not be guilty of conspiring with those who transported her. *Gebardi*, 287 U.S. at 123. It explained that the "participation which the [Mann Act] contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, [is] not automatically to be made punishable" under the conspiracy statute. *Ibid.* In so holding, the Court cited several cases establishing that a "purchaser of liquor" should not "be regarded as an abettor of the illegal sale." *Id.* at 119.

Gebardi establishes that, when a statute "contemplates"—but does not itself punish—participation by another party "as an inseparable incident of all cases" of a statutory violation, then the other party may not be punished as an accessory or a conspirator. 287 U.S. at 123. "The rationale is that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by others in the offense as a crime." *United States* v. *Southard*, 700 F.2d 1, 20 (1st Cir.), cert. denied, 464 U.S. 823 (1983). Applying *Gebardi*, courts have held that a receiver of drugs may not be prosecuted for aiding and abetting the illegal distribution of drugs, since receipt by *someone* is a necessary incident of all cases of distribution. See *United States* v. *Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977); *United States* v. *Harold*, 531 F.2d 704, 705 (5th Cir. 1976).

The *Gebardi* principle does not apply here, however, because it is limited to cases in which the "participation by another is *inevitably* incident to" the commission of the underlying offense. LaFave § 13.3(e) at 370 (emphasis added). The drafters of the Model Penal Code described the rule in similar terms: "[T]he exception is confined to conduct 'inevitably incident to' the commission of the crime." Model Penal Code § 2.06 cmt. 9(b), at 325 (1985) (citation omitted). Significantly, Section 843(b), unlike the aiding-and-abetting and conspiracy statutes, requires more than simple participation in a drug-distribution offense or agreement to participate in such an offense: it requires the use of a communication facility to cause or facilitate that offense. And although receipt is "an inseparable incident of all cases" of distribution, the use of a communication facility is not. *Gebardi*, 287 U.S. at 123. In other words, because Section 843(b) requires that the facilitation occur through the use of a communication facility, giving "facilitating" its ordinary meaning would not make all or even most purchasers liable for facilitating sales. Petitioner's observation (Br. 30) that some cases have treated "facilitating" and "aiding" or "abetting" as synonyms is therefore beside the point, and *Gebardi* provides no basis for departing from a plain-language interpretation of Section 843(b).

2. Two other features of Section 843(b) reinforce the conclusion that Congress intended the violation to be independent of the drug offense either facilitated or committed by the offender, and that it elected not to incorporate *Gebardi* principles of accessory liability. First, under Section 843(b), "[e]ach separate use of a communication facility shall be a separate offense." Thus, if an offender makes multiple telephone calls to

purchase a single quantity of drugs—as petitioner did in this case, see Pet. App. 4a-6a—he is liable for multiple Section 843(b) offenses. Under an aiding-and-abetting theory, by contrast, multiple telephone calls in furtherance of a single distribution would constitute a single aiding-and-abetting offense. That is because 18 U.S.C. 2 provides that those who aid and abet the commission of an offense are punishable as principals, and the principal has committed only one distribution. Cf. *Busic* v. *United States*, 446 U.S. 398, 411 n.18 (1980) (multiple acts of aiding and abetting may merge once defendant is treated as a principal in committing the offense he aided and abetted). If Congress had intended to incorporate aiding-and-abetting prinicples into Section 843(b), it would have made the unit of prosecution the offense facilitated, not the individual use of a communication facility.

Second, the penalty imposed by Section 843(b) also supports the conclusion that Congress elected not to apply aiding-and-abetting principles to the violation. The maximum penalty for a first offense under Section 843(b) is four years of imprisonment. In some cases, that penalty may be greater than that associated with the drug felony that is caused or facilitated; in other cases, it may be substantially less. Had Congress intended to employ an aiding-and-abetting approach, the penalty would have been linked to the offense facilitated, as it would be for an accessory. See 18 U.S.C. 2.

C. The Statutory Context Does Not Support Petitioner's Interpretation

Petitioner argues (Br. 14-22) that applying Section 843(b) according to its plain meaning would be inconsistent with Congress' treatment of simple possession as a misdemeanor. In his view (*id.* at 18), the CSA "draw[s]

a fundamental distinction between drug traffickers and drug users," treating the former as felons and the latter as misdemeanants. He contends that the application of Section 843(b) to those who use a communication facilty to purchase drugs would undermine that distinction. For that reason, he asserts, the "context" of Section 843(b) dictates that the statute be read not to apply to those who use a communication facility in purchasing drugs for their own use. That argument lacks merit.

1. Petitioner is correct when he observes (Br. 13) that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). But the meaning of the words used in Section 843(b) is plain, and petitioner has not shown that the statutory context overcomes the plain text and leads to the result he advocates.

In particular, petitioner's implicit premise—that the user of a communication facility cannot be guilty under Section 843(b) unless he is committing a felony himself—fails to take account of the word "any" in the statutory phrase "causing or facilitating the commission of *any* act or acts constituting a felony." 21 U.S.C. 843(b). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's* 97), and in this case it makes clear that the "acts constituting a felony" can be committed by the user of the telephone or by a third party. See Pet. App. 11a ("The statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated."). Petitioner's premise is also inconsistent with his apparent recognition (Br. 35-36) that a non-purchaser can violate Section 843(b) by causing or facilitat-

ing a third-party's distribution. See, *e.g.*, *United States* v. *Toro*, 840 F.2d 1221, 1233 (5th Cir. 1988) (use of telephone to arrange for drug sale to third party violates Section 843(b)). He does not explain how the language of the statute can be read to cover facilitation of a distribution to someone else if it does not cover facilitation of a distribution to the defendant.

In sum, petitioner cannot show that the context of Section 843(b) sheds any light on the meaning of the statutory terms in a way that would yield the outcome he seeks. Instead, his argument based on "context" is essentially a claim that reading the statute as written would yield bad policy. Even if that were correct, it would not justify departing from the statutory language. See *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.").

2. In any event, petitioner's contention that it would be incongruous to apply Section 843(b) when a would-be drug possessor uses a covered means of communication to facilitate a felony distribution to himself lacks merit. Petitioner concedes (Br. 14 n.3) that Congress has not treated all drug-possession offenses as misdemeanors. He suggests (*ibid.*) that Congress has declined to show solicitude for possessors of drugs in "situations involving aggravating circumstances." Those "aggravating circumstances" are so numerous, however, that they undermine petitioner's claim that Congress intended to establish a general rule that not only possession, but also all related offenses, would be treated as misdemeanors.

Under 21 U.S.C. 844(a), simple possession of controlled substances is a misdemeanor only when it is a first offense. When it follows a prior conviction under

state or federal law for any drug offense—including possession—it is a felony punishable by "not less than 15 days but not more than 2 years" of imprisonment. 21 U.S.C. 844(a). In this case, for example, petitioner had sustained a prior state conviction for cocaine possession, and if it remained in effect (a matter not determined in this case, see C.A. App. 351-353), his possession of cocaine could have been prosecuted as a felony under Section 844(a). PSR ¶ 24.

Moreover, even as a first offense, simple possession of certain particularly dangerous controlled substances is a felony. See, *e.g.*, 21 U.S.C. 844(a) ("[A]ny person convicted under [Section 844] for the possession of flunitrazepam shall be imprisoned for not more than 3 years."). Indeed, simple possession of more than 5 grams of "a mixture or substance which contains cocaine base" is a felony with a mandatory minimum sentence of 5 years of imprisonment. *Ibid.*

Receiving a controlled substance can also be punished as a felony in certain circumstances. For example, 21 U.S.C. 861(a)(3) makes it a felony to "receive a controlled substance from a person under 18 years of age, other than an immediate family member." That receipt offense is indistinguishable from the Section 844(a) possession offense, except in regard to the source of the drugs, and the statute does not require that the receiver know the age of the person supplying the drugs. *United States* v. *Cook*, 76 F.3d 596, 599-602 (4th Cir.), cert. denied, 519 U.S. 939 (1996). It is also a felony to "acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." 21 U.S.C. 843(a)(3). See, *e.g.*, *Hays* v. *United States*, 397 F.3d 564 (7th Cir.), cert. denied, 546 U.S. 936

(2005); *United States* v. *Wells*, 211 F.3d 988, 1000-1001 (6th Cir. 2000).

Many acts closely related to possession are also felonies under the CSA. For example, when one user of a drug such as cocaine shares it with another person, even without any sale, that drug-sharing is a felony distribution. See *United States* v. *Pearson*, 391 F.3d 1072, 1075-1077 (9th Cir. 2004); *United States* v. *Washington*, 41 F.3d 917, 920 (4th Cir. 1994); but see 21 U.S.C. 841(b)(4) (providing a limited exception for certain cases of sharing marijuana). In addition, a person who facilitates the simple possession of drugs by others by "mak[ing] available for use, with or without compensation, [a] place for the purpose of unlawfully * * * using a controlled substance," is punishable by up to 20 years of imprisonment, even though the crime facilitated may be merely a misdemeanor. 21 U.S.C. 856(a)(2) and (b).

Contrary to petitioner's suggestion, Congress' solicitude for simple possession is not the rule that should govern the interpretation of other statutory provisions; it is an exception to Congress' severe criminalization of the drug trade, including of acts that facilitate the possession and use of drugs. It is precisely because such lenient treatment of first-offender drug users was exceptional that, as petitioner puts it (Br. 16) "Congress devoted considerable attention to the contours of the new misdemeanor offense of simple possession" when it enacted the CSA in 1970. A first offender who is found in possession of drugs for personal use is treated with special leniency in the hope that his first involvement with drugs will be his last. By the time he has committed his second offense, that special leniency is exhausted and he is treated as a felon. When he is sufficiently acclimated to the drug trade that he is causing or facilitat-

ing drug distribution by using a communication facility to arrange for a sale by a drug dealer, he likewise is treated as a felon, although there is no minimum punishment and he might receive probation—as petitioner did, Pet. App. 7a-8a—if he shows to the satisfaction of the court that he warrants special leniency.

3. Petitioner's argument about the supposed anomaly of allowing Section 843(b) to cover drug purchasers is flawed for the additional reason that it ignores an important element of that provision: the use of a communication facility. Indeed, he refers repeatedly (Br. 9, 10, 19, 34) to drug purchasers who "happen" to use a telephone, going so far as to suggest that it is "routine" (*id.* at 12) or "utterly commonplace" (*id.* at 20) for people to purchase drugs by means of telephone or email communications. Petitioner's view appears to be that the use of a telephone or other communication facility is a matter of mere happenstance that should have no legal significance. The very existence of Section 843(b), however, demonstrates that Congress's judgment was quite different. And there are several reasons why Congress could reasonably have chosen to provide for felony punishment of those who use communication facilities to cause or facilitate a drug transaction.

Congress has traditionally sought "to keep the channels of interstate commerce free from immoral and injurious uses." *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917). Its authority to do so "has been frequently sustained, and is no longer open to question." *Ibid.* Section 843(b) represents an effort to ensure that such channels of communication as the mail, telephones, wire, and radio will not be used for illegal drug transactions.

That effort has become even more important as a result of the rapid development of modern communica-

tions technologies. Today's communication facilities make legitimate commerce easier and more efficient, but they also make illicit drug transactions easier and more efficient. Indeed, they offer particular advantages to illicit commerce, because they greatly reduce the risk that the participants will be detected while negotiating a transaction. Petitioner describes (Br. 33) that possibility as speculative, but the facts of this case provide a good illustration of it. After traveling to an agreed-upon rendezvous point where he was to meet his dealer, petitioner discovered that there were other people there. Pet. App. 5a. Rather than proceed with the cocaine purchase in front of potential witnesses, petitioner drove to a different location and then used a cell phone to call his dealer and inform him of the change of plans. *Ibid.*

Many courts have observed that participants in drug transactions recognize the advantages offered by cell phones. See, *e.g.*, *United States* v. *Burkley*, 513 F.3d 1183, 1189 (10th Cir.) (expert testified that "possess[ing] more than one cell phone" is "a common practice in the drug trade"), cert. denied, 128 S. Ct. 2979 (2008); *United States* v. *Bailey*, 510 F.3d 562, 567 (6th Cir. 2007) (expert testified "that dealers often carry *two* cell phones—one to contact customers and one to contact suppliers—so that if police trace the call records of their customers it will not lead to their suppliers"). And when cell phones were less common, devices such as beepers and pagers offered similar advantages. See, *e.g.*, *United States* v. *Tapia-Ortiz*, 23 F.3d 738, 741 (2d Cir.) (expert "explain[ed] that drug traffickers employ certain techniques, such as using beepers * * * in order to avoid detection"), cert. denied, 513 U.S. 877, and 513 U.S. 912 (1994); *United States* v. *Jefferson*, 925 F.2d 1242, 1252 (10th Cir. 1991) (same); *United States* v. *Solis*, 923 F.2d

548, 549-550 (7th Cir. 1991) (expert testified that beepers "permit drug traffickers to be anonymous and mobile"); see also *United States* v. *Rogers*, 918 F.2d 207, 212-213 (D.C. Cir. 1990). It is therefore hardly surprising that Congress decided to treat the use of a communication facility in a drug transaction as a significant act warranting additional punishment.

Amicus NACDL notes (Br. 15-19) that the growth in the use of cell phones and text messaging to arrange for the distribution of drugs gives Section 843(b) greater applicability than Congress might originally have contemplated. But Congress deliberately wrote the statutory definition of "communication facility" in broad terms, including not only "mail, telephone, wire, [and] radio," but also "all other means of communication." The statute's scope should not be judicially narrowed simply because of changes in communication technology. As this Court has recognized, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007) (citation omitted).

Amicus also asserts (NACDL Br. 23) that participants in drug transactions do not have a good reason to use communication facilities, since the use of such facilities increases the risk of detection because telephone calls and emails can be intercepted by the police. That argument fares no better. The risk of interception exists only when the police have reason to suspect one of the parties to the transaction, and can meet the necessity standards to obtain a wiretap, see Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, whereas a face-to-face meeting always poses some risk of detection. Even though some kind of meet-

ing will often be necessary to complete the transaction, that meeting will be shorter and less likely to attract attention if the terms of the transaction and the parties' conduct when they meet have already been arranged through the use of a communication facility.

Finally, petitioner contends (Br. 21) that there is a special "discord between the court of appeals' interpretation of Section 843(b) and Congress's objectives" when the person initiating the telephone call is the drug dealer and the buyer uses that telephone call to facilitate the drug distribution. But the potential buyer is not liable simply because he receives a call; liability attaches under Section 843(b) only if he uses the call to participate in a drug transaction. If a potential buyer does use the drug dealer's telephone call to facilitate the distribution of drugs to him, there is no reason in logic or policy why he should be immune from prosecution under Section 843(b).

4. Contrary to petitioner's suggestion, Section 843(b) is hardly unique in providing felony punishment for the use of a communication facility to facilitate another unlawful activity, even when the defendant's role in the activity would otherwise constitute only a misdemeanor. Indeed, there are several statutes under which activity that otherwise would not be a federal offense at all becomes a felony if it is conducted through the use of communication facilities. See, *e.g.*, 18 U.S.C. 1084 (transmission of wagering information); 18 U.S.C. 1343 (wire fraud); 18 U.S.C. 1468 (distributing obscene material by cable or satellite television). While some of those activities would be punishable under state law, they would not necessarily be felonies. See, *e.g.*, *Perrin* v. *United States*, 444 U.S. 37 (1979) (holding that the Travel Act prohibits the use of the facilities of interstate

commerce to commit a state misdemeanor commercial-bribery offense). In short, there is nothing anomalous about subjecting drug purchasers to higher penalties if they use communication facilities to carry out their unlawful transactions.

D. The Legislative History Of Section 843(b) Does Not Warrant A Different Result

Because the language of Section 843(b) is clear, there is no need for recourse to the legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). In any event, petitioner's arguments (Br. 15-18, 23-25) based on the legislative history are unpersuasive, and the legislative history offers no reason to doubt that Section 843(b) applies to the use of communication facilities by drug purchasers.

1. Section 843(b) is derived from 18 U.S.C. 1403 (1964), which was enacted as part of the Narcotic Control Act of 1956, ch. 629, § 201, 70 Stat. 573. That statute provided up to five years of imprisonment, with a mandatory minimum of two years of imprisonment, for any person who "use[d] any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in" specified statutes pertaining to controlled substances. 18 U.S.C. 1403(a) (1964). Those offenses included the receipt of narcotics. See 21 U.S.C. 174 (1964).

When the bill that became the Narcotic Control Act was introduced in the Senate, it did not contain the communication-facility provision. S. 3760, 84th Cong., 2d

Sess. (1956). It did, however, authorize federal agents to intercept "any telephonic communication in the course of any investigation to detect or prevent" certain narcotics violations. *Narcotic Control Act of 1956: Hearing on S. 3760 Before the Subcomm. on Improvement in the Federal Criminal Code of the Senate Comm. on the Judiciary*, 84th Cong., 2d Sess. 4 (1956) (quoting S. 3760 § 1407). As the Senate Committee Report explained, that provision was necessary because drug traffickers "use the telephone extensively, and it helps to conceal their identity." S. Rep. No. 1997, 84th Cong., 2d Sess. 10 (1956); see 102 Cong. Rec. 9016 (1956) (statement of Sen. Daniel) (noting that drug traffickers "are protected in their use of the telephone"). Although the discussion of the wiretapping section focused on dealers and traffickers, perhaps because they represented the most obvious example of the need for the provision, the scope of wiretapping authority was not so limited, and it would have extended to investigations of purchasers.

The wiretapping provision faced significant opposition on constitutional grounds, see, *e.g.*, 102 Cong. Rec. at 9036-9042 (statement of Sen. Morse), and the provision that became Section 1403 was proposed as a substitute, see *id.* at 9042 (statement of Sen. Daniel); *id.* at 9302 (amendment offered by Sen. Morse); *id.* at 9304 (statement of Sen. Daniel). As noted above, the substitute provision made it unlawful to use communication facilities to cause or facilitate the receipt of narcotics. And as petitioner recognizes (Br. 23), Section 1403 was in fact applied to the use of a communication facility to purchase small quantities of drugs. See *United States* v. *Alvarado*, 321 F.2d 336, 336-337 (2d Cir. 1963) (letter to order $80 of marijuana), cert. denied, 375 U.S. 987 (1964); *United States* v. *Norton*, 310 F.2d 718, 718-719

(2d Cir. 1962) (purchase of heroin); *United States* v. *Butler*, 204 F. Supp. 339, 340-341 (S.D.N.Y. 1962) (telephone calls to purchase half ounce of drugs); *United States* v. *Robles*, 185 F. Supp. 82, 85 (N.D. Cal. 1960) (letter to purchase heroin). Indeed, nowhere in the case law was there any suggestion that Section 1403 applied to the use of communication facilities by the distributor, but not by the purchaser.

2. When it enacted the CSA in 1970, Congress moved the communication-facility provision from Title 18 to Title 21. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 403(b), 84 Stat. 1263 (21 U.S.C. 843(b)). In keeping with a general approach of eliminating mandatory minimum sentences for most drug offenses, see S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969), Congress removed the two-year minimum for the communication-facility offense, and it also lowered the maximum penalty from five years to four years.

Petitioner points out (Br. 15) that the 1970 statute reduced simple possession of a controlled substance to a misdemeanor rather than a felony. From that fact, he infers that Congress intended to give a free pass to those who facilitate a felony distribution when they are on the receiving end rather than the supplying end. Section 843(b)'s limited legislative history discloses no such intent to undermine Congress's "comprehensive regime to combat the * * * traffic in illicit drugs." *Gonzales* v. *Raich*, 545 U.S. 1, 12 (2005).

Petitioner emphasizes (Br. 15-18) that Congress intended to distinguish between distributors and simple possessors. That is true but beside the point. The distinction is embodied in Sections 841 and 844, which respectively prohibit distribution and possession. But the

distinction is immaterial under the text of Section 843(b), which prohibits neither distribution nor possession as such but instead proscribes a third and wholly separate category of conduct: using a communication facility in causing or facilitating a drug felony. The House Report and the floor statement on which petitioner relies do not aid him, because they relate only to the distribution-possession dichotomy of Sections 841 and 844, not to causation or facilitation under Section 843(b). See H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 11 (1970) (distinguishing possession with intent to distribute under Section 841 from "possession for one's own use," under Section 844); see also *id.* at 46, 48-49; 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland) (discussing Section 844).

Had Congress meant to provide an exception for those who cause or facilitate a felony distribution of drugs to themselves as opposed to someone else, it could have done so explicitly, but it did not. The omission is significant for two reasons. First, as petitioner does not dispute, Section 843(b) plainly does cover a defendant's use of a communication facility to buy a personal-use amount of drugs where the defendant's simple possession is itself a felony—for example, because the defendant possesses cocaine base, or because he has prior drug convictions. 21 U.S.C. 844(a); see *United States* v. *Williams*, 176 F.3d 714, 717 n.3 (3d Cir. 1999) (Alito, J.) (observing that "a defendant could be convicted under [Section] 843(b)" even in a case of "mere possession," and noting the "example" of where, under Section 844(a), the defendant commits a felony by possessing a controlled substance "after a prior conviction"). Second, as discussed above, Section 1403(a) unquestionably reached purchasers who used communication facilities.

Had Congress intended to eliminate that coverage, not only would it have been expected to do so explicitly in the new provision, but it also would have been expected to mention its intention in the legislative history. In fact, despite extensive discussion of the lower penalties for possession under Section 844, there was almost no mention at all of Section 843(b) in the legislative history, let alone any suggestion that its scope would be different in this respect from that of Section 1403(a). See, *e.g.*, 116 Cong. Rec. at 33,314 (statement of Rep. Bush) ("There are many other crimes provided for in the prohibited acts portion of this bill, such as * * * unlawful use of a communication facility to facilitate the commission of a felony under the act."). The lack of any discussion of the change that petitioner believes took place "can be likened to the dog that did not bark," and it strongly suggests that the change did not occur. *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991).

3. Petitioner emphasizes (Br. 22-25) that the former Section 1403 applied to the facilitation of "an offense" under certain provisions, whereas Section 843(b) specifically applies to the facilitation of "a felony" under the CSA. The amendment does not appear to have been discussed in the legislative history, but according to petitioner, the only reason Congress would have employed the term "a felony" was to avoid imposing Section 843(b) liability on persons who used a communication facility to purchase drugs for their own consumption.

Petitioner is incorrect, because there are other reasons why Congress would have specified the "felony" limitation. The CSA created many misdemeanor regulatory offenses, such as mislabeling a controlled substance, failing to keep records relating to controlled substances, or unlawfully distributing a schedule V con-

trolled substance. See, *e.g.*, 21 U.S.C. 842(a)(1)-(14) (defining offenses); 21 U.S.C. 842(c)(2)(a) (misdemeanor punishment for knowing violations); 21 U.S.C. 841(b)(3) (distribution of schedule V controlled substance). Congress could reasonably have determined that the use of a communication facility to facilitate *only* misdemeanor offenses—by both the recipient of the call and the caller—did not warrant felony punishment. Here, too, the change in the language of the communication-facility provision does not demonstrate an intent to narrow its scope.

E. The Rule Of Lenity Does Not Apply

Finally, petitioner's reliance (Br. 40-41) on the rule of lenity is misplaced. The rule applies only when the statute contains a "grievous ambiguity or uncertainty." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity [is] sufficient to warrant application of [the] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted). Given the plain language of the statute and the common meanings of "causing" and "facilitating," Section 843(b) contains no such "grievous ambiguity."

In addition, the fundamental concern of the rule of lenity is ensuring that individuals have fair warning of what conduct is prohibited. See *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). That concern is attenuated where, as here, the statute in question does not

draw a line between innocent and culpable conduct but instead applies only to conduct that is already unlawful. Cf. *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005) (discussing the situation in which "the act underlying the conviction * * * is by itself innocuous" and "not inherently malign"). Application of the rule of lenity would not serve an innocence-protecting purpose in this case, because petitioner was hardly required to speculate as to whether his purchases of cocaine were lawful.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 2 provides:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * * * *

3. 21 U.S.C. 843 provides in pertinent part:

Prohibited acts C

* * * * *

(b) Communication facility

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * * * *

(d) Penalties

(1) Except as provided in paragraph (2), any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine under Title 18, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant

substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine under Title 18, or both.

* * * * *

4. 21 U.S.C. 844 provides in pertinent part:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both,

except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as other-

wise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

* * * * *

REPLY BRIEF

FOR ARGUMENT

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

No. 08-192

IN THE

Supreme Court of the United States

SALMAN KHADE ABUELHAWA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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Webster's New International Dictionary (2d ed. 1953)..... 7

REPLY BRIEF FOR PETITIONER

Congress, in the Controlled Substances Act of 1970 (CSA), dramatically shifted its approach towards drug users, whether first-time youthful experimenters or longtime addicts. Congress made the possession of drugs for personal use a misdemeanor rather than a felony, and prescribed rehabilitation rather than punishment as the appropriate response. The government nonetheless charged petitioner, when he obtained two grams of cocaine for his own personal use, with six felony counts potentially carrying a total sentence of up to 24 years of imprisonment. In the government's view, petitioner would have merited lenient treatment and rehabilitation as a misdemeanant had he and his dealer conducted an entirely face-to-face transaction, but petitioner became transformed into a felon subject to severe punishment because he used his cellular phone in arranging their face-to-face meeting.

Nothing in the terms, context, or history of 21 U.S.C. § 843(b) supports that counterintuitive result. With respect to the text, Section 843(b) bars the use of a communication facility "in committing," "in causing," or "in facilitating" the commission of a drug "felony." Because petitioner purchased drugs strictly for his own use, a misdemeanor, there is no argument that petitioner "committed" a drug "felony." And in light of the long-settled understanding that a buyer of drugs does not aid or abet (or equivalently, "facilitate") his dealer's distribution of drugs to him, petitioner's purchase of drugs did not "facilitate" his dealer's "felony" distribution. Because petitioner's purchase of drugs did not "facilitate" his dealer's "felony" distribution, petitioner did not use his phone

"in facilitating"—*i.e.*, in the course of facilitating—a drug "felony."

With respect to the statutory context, the government offers no sound basis for concluding that Congress would make the fundamental choice to afford leniency and rehabilitation to drug users, but would cast aside that approach in favor of stiff felony punishment of any user who exchanges a phone call, e-mail, or text message in obtaining drugs instead of doing so entirely face-to-face. Attributing any such intention to Congress would be especially unwarranted in light of the statutory history of Section 843(b). When establishing in the CSA that possession of drugs for personal use would constitute only a misdemeanor, Congress simultaneously narrowed the terms of Section 843(b) specifically to exclude from its reach the use of a communication facility in connection with a drug misdemeanor. The government's efforts to minimize the significance of that textual change are unpersuasive: Congress would not have amended Section 843(b) to exclude a drug user's use of a phone in connection with his own misdemeanor, only to have the very same conduct come back within the provision if simply recast as "facilitating" his dealer's "felony."

The government fares no better in its alternative argument—not considered below—that petitioner used a phone in "causing" his dealer's "felony." If the government were correct, it could routinely circumvent the rule that a buyer of drugs does not "aid or abet" his dealer's distribution by charging the buyer instead with "causing" the distribution. The government's "cause" theory, no less than its "facilitate" theory, cannot be squared with the statutory text,

context, and history, and affords no sounder basis for transforming a misdemeanant drug user into a felon subject to stiff punishment based on his use of a phone in obtaining his drugs. Finally, with regard to both the "causing" and "facilitating" theories, the rule of lenity compels reading Section 843(b) to exclude the use of a phone by a misdemeanant drug user in purchasing drugs for his own personal use.

A. The Established Rule Under *Gebardi* That A Purchaser Does Not Facilitate His Seller's Distribution Applies To Section 843(b)

The government argues (Br. 10-14) that the use of a phone in buying drugs for personal use amounts to use of a phone in "facilitating" the dealer's "felony" distribution under Section 843(b). The government's reading of the statute is incorrect. The terms of the statute, when read against the backdrop of the long-settled buyer/seller rule and this Court's associated decision in *Gebardi v. United States*, 287 U.S. 112 (1932), do not encompass the use of a phone in obtaining drugs for personal use.

1. Under the buyer/seller rule, a buyer of contraband cannot be charged with "aiding or abetting" the seller's unlawful distribution. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(e), at 371 (2d ed. 2003); *Lott v. United States*, 205 F. 28, 29-31 (9th Cir. 1913). Relying on that principle in *Gebardi*, this Court recognized that a "purchaser of liquor" cannot be convicted "as an abettor of the illegal sale." 287 U.S. at 119; *see also United States v. Farrar*, 281 U.S. 624, 634 (1930). And applying *Gebardi*, courts of appeals have held that a person who purchases drugs for personal use cannot be convicted under 18 U.S.C. § 2 for "aiding or abetting" his seller's felony

distribution of the drugs to him. *See United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977); *United States v. Harold*, 531 F.2d 704, 705 (5th Cir. 1976).

Section 843(b) uses the term "facilitating," rather than "aiding or abetting." But the legal meaning of "facilitating" is equivalent to that of "aiding or abetting." *See* Pet. Br. 28-30; *Black's Law Dictionary* 76, 627 (8th ed. 2004) (defining "aid and abet" as to "facilitate the commission of a crime," and "facilitation" as the "act or an instance of aiding or helping"). Courts therefore have concluded that "'facilitation' for purposes of § 843(b) amounts to the same thing as 'aiding and abetting.'" *United States v. Jimenez*, 533 F.3d 1110, 1114 (9th Cir. 2008); *see United States v. Walton*, 56 F.3d 551, 556 (4th Cir. 1995) ("[U]sing the telephone system in facilitating the distribution of narcotics is equivalent to aiding and abetting that distribution.").

The parallel structure of the general aiding-or-abetting statute and Section 843(b) reinforces the definitional equivalence between "aiding or abetting" in the former and "facilitating" in the latter. The general aiding-or-abetting statute sets forth three categories of offenders who are punishable as a principal: (i) a person who "commits" an "offense against the United States"; (ii) a person who "aids" or "abets" (or "counsels, commands, induces, or procures") such an offense; and (iii) a person who "causes" such an offense. 18 U.S.C. § 2(a)-(b). In directly parallel fashion, Section 843(b) bars the use of a phone "in committing," "facilitating," or "causing" a drug "felony." 21 U.S.C. § 843(b). "Facilitating" in Section 843(b) thus serves precisely the same role as "aiding or abetting" in 18 U.S.C. § 2. And just as a person purchasing drugs for personal use is not "aiding or

abetting" his seller's distribution under 18 U.S.C. § 2, the person cannot be charged with "facilitating" his seller's "felony" distribution under Section 843(b). Indeed, this Court has recognized that a customer does not "facilitate" an illegal business. *See Rewis v. United States*, 401 U.S. 808, 811 (1971).[1]

2. The government concedes that, under *Gebardi*, a purchaser of drugs for personal use cannot be charged with "aiding or abetting" his seller's felony distribution. Gov't Br. 14-15. The government also does not dispute that the terms "facilitating" and "aiding or abetting" are legal equivalents, such that the purchaser also is not "facilitating" his seller's distribution. *See id.* at 16. The government nonetheless argues that *Gebardi* and the buyer/seller rule have no bearing on the applicability of Section 843(b) to this case. According to the government, *Gebardi* forecloses aider-or-abettor (or facilitator) liability only with respect to conduct "inevitably incident" to

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[1] The statute at issue in *Rewis*, the Travel Act, targets persons traveling in interstate commerce with an intent to "facilitate" the "promotion, management, establishment, or carrying on, of [certain] unlawful activity." 18 U.S.C. §§ 1952(a), (a)(3), (b)(i). The Court observed that "the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." 401 U.S. at 811. Although the government attempts to distinguish the Court's statement on the ground that the Travel Act requires an intent to facilitate (Gov't Br. 12), nothing in the Court's opinion suggests that its interpretation turned on the intent requirement. To the contrary, if, as the government evidently believes, a customer "facilitates" a business he patronizes, there would be no basis for categorically holding that he does not intend to facilitate the business. *See United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) (invoking the rule that "the jury is entitled to presume that a person intends the natural and probable consequences of his acts").

the primary offense; and while the purchase of drugs may be inevitably incident to the seller's felony distribution, the use of a cell phone or other communication facility by the purchaser is not. *Id.* The government's argument is fundamentally flawed for three separate reasons.

a. As an initial matter, assuming *arguendo* that the *Gebardi* principle is limited to conduct "inevitably incident" to the primary offense, the buyer/seller rule still dictates the inapplicability of Section 843(b)'s "facilitating" prong in this case. There is no merit to the government's effort to disentangle petitioner's use of a phone from the underlying act with which that use was integrally connected—*i.e.*, the purchase of drugs for personal use. The entire point of petitioner's phone use was to enable him to obtain drugs for personal use. His use of the phone thus was an inseparable component of the underlying purchase itself. And that underlying conduct *is* inevitably incident to the seller's "felony" distribution. If, as the government does not dispute, purchasing drugs for personal use therefore fails to constitute conduct "facilitating" the buyer's "felony" distribution, the use of a phone in connection with that purchase also cannot constitute conduct "facilitating" the "felony." *See* Pet. Br. 30.

The government's argument would equally apply, for instance, if petitioner had been charged under a hypothetical statute barring the "use of a phone in aiding or abetting the distribution of drugs." Even though petitioner's purchase of drugs, under the buyer/seller rule, would fail to constitute conduct "aiding or abetting the distribution of drugs," the government nonetheless would permit his prosecution on the basis that the statute singles out the "use

of a phone" in "aiding or abetting the distribution of drugs." That result would make little sense: if the purchase of drugs fails to constitute "aiding or abetting the distribution of drugs," the buyer's use of a phone in furthering the purchase could not constitute the "use of a phone in aiding or abetting the distribution of drugs." At the least, a legislature enacting the hypothetical statute would so assume. The same reasoning should control here.

The text of Section 843(b) speaks directly to the matter. Section 843 bars the use of a communication facility "in facilitating" a "felony" distribution of drugs. The term "facilitating" is in the present progressive tense, which "indicates a happening in progress at a given time." Randolph Quirk et al., *A Comprehensive Grammar of the English Language* 197 (1985) (capitalization deleted).[2] When preceding a verb in the present progressive tense, the word "in" means "in the course of." *Webster's Third New International Dictionary* 1139 (1961) ("in the course of," with the examples "drowned [in] crossing the river"; "[in] cooling this material hardens"); *The American Heritage Dictionary of the English Language* 910 (3d ed. 1992) ("[d]uring the act or process of," as in the phrase "tripped in racing for the bus" (emphasis deleted)); *Webster's New International Dictionary* 1253 (2d ed. 1953) ("[d]uring the course of," with the example "spoiled *in* the making").

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[2] 1 George O. Curme, *A Grammar of the English Language* § 52(2), at 233 (1935) ("[The progressive] aspect represents the action as progressing, proceeding, hence as not ended."); *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) (present progressive tense, or "-ing form" of a verb, "generally indicates continuing action").

The text of Section 843(b) therefore requires that the use of a phone occur in the course of "facilitating" a drug "felony"—*i.e.*, in the course of some underlying "facilitating" conduct. In the context of this case, the purchaser uses a phone in the course of purchasing drugs for personal use. But because, under *Gebardi* and the buyer/seller rule, the underlying conduct of purchasing drugs for personal use does not qualify as "facilitating" a "felony" distribution, the use of a phone to arrange the transaction fails to constitute use of a communication device "in facilitating" a drug "felony." *See* Pet. Br. 30.

The government assumes that Section 843(b) addresses the use of a communication device "that facilitates" a drug "felony." For instance, the government contends that "it is not at all strange to say that a customer's *use* of something . . . *would facilitate* an individual sale," and that "Section 843(b) speaks in just such terms." Gov't Br. 11 (second emphasis added). But Section 843(b) does not speak in terms of whether a person's use of a phone "facilitates" (or "would facilitate") a drug "felony." The provision instead asks whether a person uses a phone "*in* facilitating"—in the course of facilitating—a drug "felony." So understood, the buyer/seller rule fully applies, and dictates the inapplicability of Section 843(b) to the purchase of drugs for personal use.

b. In any event, *Gebardi*'s approach, contrary to the government's understanding, is not confined to conduct that is "inevitably incident to" the primary offense, or even to conduct almost always incident to it. Rather, *Gebardi* by its own terms applies to conduct "frequently, if not normally," incident to the principal offense. 287 U.S. at 121. As the Court there reasoned, when Congress forgoes directly pun-

ishing in the primary offense conduct that is "frequently" incident to the commission of that offense, any effort to punish it indirectly as aiding, abetting, or facilitating the offense would presumptively circumvent Congress's intent. *See id.* at 121-23.[3]

Gebardi illustrates that principle. The statute in *Gebardi* made it unlawful for a person to transport a woman for immoral purposes or to "aid or assist" in the transportation. *Id.* at 118. The Court addressed whether a woman who participated voluntarily in the transportation could be convicted of "aiding or assisting" it or conspiring to commit the offense. The Court expressly acknowledged that, because a woman could be "intimidated or forced into the transportation," a woman's voluntary participation was not inevitably incident to the transporter's offense. *Id.* at 121. But because the offense "frequently, if not normally, involve[d] consent and agreement on the part of the woman to the forbidden transportation," *id.*, the Court held that a woman who participated voluntarily in the transportation could not be convicted of either "aiding or assisting" it or conspiring to commit the offense. *Id.* at 118-23.

Here, there is no dispute that purchasers of drugs for personal use "frequently, if not normally" use a phone or other communication facility in the course of arranging to obtain drugs from their distributors. *Id.* at 121. As a result, even if the government were correct to focus exclusively on the extent to which a

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[3] *See also People v. Manini*, 594 N.E.2d 563, 567-68 (N.Y. 1992) (holding that a seller cannot be convicted of aiding or abetting a buyer's possession, because even though a person can possess drugs "by finding, stealing or manufacturing them," the legislature would not have intended to impose accessory liability in "the typical drug transaction").

purchaser's use of a communication device is incident to the seller's felony distribution, *Gebardi* establishes that the purchaser may not be charged under Section 843(b) with using a phone in "facilitating" the seller's "felony."

c. The government's effort to avoid the *Gebardi* principle fails for an additional, independent reason. Although the government's argument assumes that the primary offense is the seller's felony distribution, *see* 21 U.S.C. § 841(a)(1), and addresses whether the use of a phone is inevitably incident to that offense, Section 843(b) also contains its *own* primary offense—*i.e.*, use of a "communication facility in committing" a drug "felony." 21 U.S.C. § 843(b). With respect to that primary offense, Congress pointedly declined to prohibit the use of a communication facility "in committing" the misdemeanor offense of possession for personal use. *See* 21 U.S.C. § 844(a); *see also* 21 U.S.C. § 846 (barring "attempts . . . to commit" any drug offense and subjecting person who attempts to commit a drug offense "to the same penalties as those prescribed for the [underlying] offense.").

In *Gebardi*, the Court refused to allow the prosecution as an "aider or assister" of a woman who voluntarily agreed to the prohibited transportation, reasoning that her prosecution on that theory would undermine Congress's decision to exclude her from the primary transportation offense and to confine it instead to "the person by whom she is transported." 287 U.S. at 119. The same reasoning applies here. It likewise would undermine Congress's election in Section 843(b) to refrain from penalizing the buyer's use of a phone in "committing" the crime of misde-

meanor simple possession to treat the very same conduct as "facilitating" the seller's "felony."

3. *Gebardi* and the buyer/seller rule also dispose of the government's argument that the use of a phone in purchasing drugs for personal use violates Section 843(b) because, under the dictionary definition of the term "facilitate," the purchaser's use of a phone ostensibly "make[s] easier" the seller's distribution. Gov't Br. 10. Under *Gebardi* and the buyer/seller rule, purchasing drugs for personal use fails to constitute conduct "facilitating" a "felony" distribution, regardless of whether it could be said in some sense to make the distribution easier. Just as a person who purchases drugs for personal use cannot be convicted of "aiding or abetting" a distribution under 18 U.S.C. § 2, regardless of whether the purchaser could be said to make the distribution easier, the purchaser also does not "facilitate" a "felony" distribution for purposes of Section 843(b). And the use of a phone in the course of the purchase could no more facilitate the distribution than the purchase itself.

Contrary to the government's characterization, that is not in any way an "atextual" interpretation of the statute. Gov't Br. 14. It instead applies the settled legal meaning of the terms "facilitating" and "aiding or abetting" rather than the outer bounds of their dictionary definitions, consistent with this Court's standard approach in interpreting statutory text. *See, e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consult-

ing any precedents or authorities that inform the analysis.").[4]

4. The government also errs in arguing (Gov't Br. 16-17) that the penalty structure of Section 843(b) precludes application of the traditional buyer/seller rule. To be sure, Section 843(b), unlike aiding-or-abetting liability under 18 U.S.C. § 2, carries a single statutory maximum penalty of four years of imprisonment regardless of the underlying offense of distribution, and "[e]ach separate use of a communication facility" is "a separate offense." 21 U.S.C. § 843(b), (d)(1). But while Congress departed from the operation of 18 U.S.C. § 2 in that limited respect, there is no basis for supposing that Congress intended to cast aside all other aiding or abetting principles, including the traditional buyer/seller rule. Indeed, at least one federal statute uses the term "aid or abet" even though it sets penalties that do not mirror the underlying offense. *See* 18 U.S.C. § 1028(a)(7) (making it a crime to use or possess "a means of identification of another person" with the intent, *inter alia*, "to aid or abet" any "unlawful activity that constitutes a violation of Federal law"); *id.* § 1028(b) (setting fixed penalties for that offense that do not track the punishment for the underlying unlawful activity). There is no reason to conclude

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[4] Even if the outer limits of the dictionary definitions—rather than the legal meaning of "facilitating" or "aiding or abetting"—were controlling, it would be far from clear that a person who uses a phone in buying drugs for personal use violates Section 843(b). The *seller* may make his *sales* easier by allowing buyers to order their drugs over the phone. But there is a strong sense in which a *buyer* who uses a phone merely takes advantage of the seller's preexisting method of doing business; the buyer's use of the phone thus would not make the distribution easier than the seller had already made it.

that the distinct penalty structure of that provision abrogates all ordinary aiding-or-abetting principles.

Moreover, Section 843(b) parallels the penalty structure in 18 U.S.C. § 2 in important respects, in that it maintains an equivalence in punishment between a person who "commits" the offense and a person who "facilitates" it. Under 18 U.S.C. § 2, a person who "commits" the principal offense faces the same penalty as a person who "aids or abets" it. Section 843(b) likewise subjects to the same maximum penalty of four years of imprisonment both a person who uses a phone "in committing" a felony distribution and a person who uses a phone "in facilitating" a felony distribution. In that regard, the provision also precisely parallels the statute at issue in *Gebardi*, which imposed equivalent penalties on the transportation of a woman for immoral purposes and on "aid[ing] or assist[ing]" such a transportation. *See* 287 U.S. at 118 & n.1. Accordingly, nothing in Section 843(b)'s penalty structure precludes applying the traditional rule that a purchaser of drugs does not "aid or abet" or "facilitate" his seller's "felony" distribution.[5]

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[5] Congress through the years has enacted a number of provisions that, like Section 843(b), themselves establish both a primary crime and a prohibition against aiding the commission of that crime. *See, e.g.*, 18 U.S.C. § 1461 (2006); 18 U.S.C. § 72 (1946); 18 U.S.C. § 354 (1946); 18 U.S.C. § 408a (1946); 19 U.S.C. § 1598 (1946). Congress did so notwithstanding the existence of a general aiding-or-abetting prohibition akin to current 18 U.S.C. § 2. *See* 18 U.S.C. § 550 (1924).

B. The Government's Theory Would Undermine Congress's Fundamental Statutory Distinction Between Drug Dealers And Drug Users

Interpreting Section 843(b) to reach buyers for personal use would stand markedly at odds with the fundamental statutory distinction drawn by Congress in the CSA between drug dealers and drug users. Congress made drug dealing a felony and imposed stiff penalties for that offense. 21 U.S.C. § 841(a)(1) and (b). At the same time, in a highly prominent change of policy, Congress made the possession of drugs for personal use a misdemeanor for first-time offenders, and prescribed rehabilitation rather than punishment as the appropriate response. 21 U.S.C. § 844(a). Indeed, Congress established that such individuals could avoid any conviction at all upon successful completion of a probationary period. 18 U.S.C. § 3607(a).

Congress's carefully-crafted approach of leniency and rehabilitation for drug users cannot be reconciled with the government's theory that the same persons should be convicted of a felony and exposed to stiff punishment whenever they use a phone in obtaining their drugs, rather than obtain them in an entirely face-to-face transaction. Any such interpretation would fail to construe the CSA's provisions to "fit" into a "harmonious whole." *FTC v. Mandel*, 359 U.S. 385, 389 (1959); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133-39 (2000) (declining to apply literal definition of statutory term "drug" to nicotine on ground that other provisions would require tobacco to be banned if nicotine were a "drug" and tobacco-specific statutes presuppose lawfulness of marketing tobacco products).

1. The government attributes to petitioner (Br. 18-19) an "implicit" argument, based on statutory context, that the user of a communication facility must himself commit a felony to violate Section 843(b). Petitioner makes no such argument, however, implicitly or otherwise. Petitioner's interpretation instead is that Section 843(b)'s "facilitating" prong covers all persons who qualify as an aider-or-abettor of a drug "felony," including persons who help arrange "a distribution to someone else." Gov't Br. 19.

The government errs in perceiving (*id.*) no textual basis for distinguishing between persons who arrange a distribution to someone else and persons who obtain drugs for their own use. First, persons who arrange sales to others, unlike purchasers for personal use, fall within the established legal meaning of aiding-or-abetting or facilitating. Second, while the terms of Section 843(b) must be harmonized with the terms of Section 844(a) making it a misdemeanor to possess drugs for personal use, there is no comparable language making it a misdemeanor to help arrange a distribution to another person. And third, the narrowing of the terms of Section 843(b) to encompass committing or facilitating only a "felony" (rather than any "offense"), *see* pp. 19-22, *infra*, excludes purchasers for personal use but has no bearing on distributions to others.

2. The government contends (Br. 19-22) that there is no anomaly in treating drug users as felons whenever they use a phone because Congress routinely treats possession as a felony when accompanied by certain aggravating circumstances, and the

use of a phone is simply another such aggravating circumstance. That argument lacks merit.

For instance, the government observes that possession of drugs is a felony in the case of a person with a prior drug conviction. But that limitation simply establishes the boundaries of the general rule: Congress prescribed rehabilitation rather than punishment for experimenters and addicts who are first-time offenders, but had no such solicitude for persons who failed to take advantage of a prior opportunity for rehabilitation.[6]

The four remaining felony possession offenses identified by the government establish only that Congress declined to extend leniency to drug possessors who engage either in conduct demonstrably harmful to third parties or in particularly dangerous

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[6] The government suggests (Br. 20) that petitioner had a prior drug conviction and that his possession of drugs for personal use thus could have been prosecuted as a felony. The government until now has made no suggestion that petitioner's possession itself constituted a felony. Instead, the government's charging theory and position throughout the proceedings has been that petitioner facilitated his *dealer*'s felony. That is with good reason. As petitioner's counsel explained at sentencing, the prior state charge against petitioner resulted in a "deferred imposition of sentence" and the charge was "dismissed" based on petitioner's "good behavior." C.A. App. 352; *see* PSR ¶ 24. Counsel agreed with the district court's suggestion that the disposition amounted to the state equivalent of "a 3607," C.A. App. 352—*i.e.*, a federal disposition under 18 U.S.C. § 3607. Such a disposition "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose," 18 U.S.C. § 3607(b), including for purposes of assessing under the simple-possession statute whether a possessor of drugs for personal use has a prior drug conviction, 18 U.S.C. § 844(a).

or independently wrongful conduct. Congress made possession of flunitrazepam a felony because it is used in "date rape" of third parties. 142 Cong. Rec. S12,377 (daily ed. Oct. 3, 1996) (Sen. Hatch). Congress made the possession of crack cocaine a felony because it viewed the drug to be especially dangerous to the user, and believed the drug to be "closely correlated with the commission of other serious crimes." Br. for the United States at 5, *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The receipt of drugs from a minor constitutes a felony because the conduct involves exploitation of children. And the acquisition of a controlled substance by fraud is a felony because Congress has long viewed fraud as an independent wrong warranting felony treatment, *see, e.g.*, 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud), and because the conduct can ensnare innocent third parties, *see, e.g.*, *United States v. Silva*, 554 F.3d 13, 16 (1st Cir. 2009) (patient duped doctors into prescribing narcotics).[7]

The use of a phone or other communication device, by contrast, does not visit demonstrable harm on third parties or involve inherently dangerous drugs or independently wrongful conduct. And while the government asserts without support (Br. 21-22) that a drug user's use of a communication facility demonstrates "acclimation" to the drug trade, first-time youthful experimenters might well communicate with a dealer by phone, e-mail, or text message, while seasoned addicts might conduct transactions exclusively face-to-face, perhaps to avoid government

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[7] The government also points (Br. 21) to provisions barring sharing of drugs with third parties and making a place available for drug-related activities. Neither is a possession offense, however, and both in any event involve harm to third parties.

surveillance. In any event, Congress *favored* rehabilitation for addicts who may be "acclimated" to using drugs but lack any prior convictions. *See* Pet. Br. 17-18.

Finally, whereas the offenses identified by the government expressly treat possession as a felony, no provision expressly treats drug possessors who use phones as felons. If Congress desired to except from its rehabilitative policy those first-time possession offenders who use a phone, it would have done so expressly.

3. The government defends its theory on the ground that a purchaser's use of a phone makes his drug transaction more difficult to detect. Gov't Br. 22-25. But insofar as Congress was concerned about the ability of the parties to evade detection by using a phone, *id.* at 23, the *seller*'s use of a phone in committing or facilitating his "felony" distribution is plainly barred by Section 843(b). With respect to the buyer, if Congress had been concerned that the use of a phone by a buyer for personal use would enable him to avoid detection, Congress would have expanded Section 843(b) beyond committing or facilitating only a "felony" to reach committing or facilitating "misdemeanor" simple possession. Congress's election not to do so demonstrates that any concerns about a drug user's ability to evade detection by using a phone were insufficient to subject him to the stiff penalties authorized by Section 843(b).

That is unsurprising. Congress should not be assumed to have intended leniency and rehabilitation for users who conduct entirely face-to-face transactions, but stiff felony punishment of users who use a

phone to arrange their face-to-face transactions. Any difference in the ease of detection presumably would not warrant such dramatically different treatment of otherwise similarly situated persons.

That is particularly true because it is not clear that a drug user who uses a communication device to arrange an exchange is more likely to avoid detection than a user who arranges the exchange through a face-to-face encounter. Congress believed that the use of a phone made it easier for drug kingpins and others who avoid physical contact with drugs to escape detection, Pet. Br. 34-35, but there is no indication of a comparable belief about persons who purchase (and physically possess) drugs for personal use. And the government offers no evidence that users who phone their dealers before obtaining their drugs in a face-to-face transaction are more successful in evading detection than users who meet their dealers at a prearranged place communicated to them face-to-face or by word-of-mouth.

C. Congress Narrowed Section 843(b) To Exclude Persons Who Purchase Drugs For Personal Use

Congress in the CSA not only made simple possession of drugs a misdemeanor. In an immediately adjacent provision, Congress also narrowed the reach of Section 843(b) from covering the use of a communication device in committing or facilitating any drug "offense," to covering the use of a communication device in committing or facilitating only a drug "felony." Pet. Br. 22-25. By changing the term "offense" to "felony," Congress reinforced that Section 843(b) would not apply to persons who use a phone in committing or facilitating its newly created

misdemeanor offense of possessing drugs for personal use. While the government addresses that statutory change in a section if its brief discussing "legislative history," Gov't Br. 26, 30-31, Congress amended the *text* of the provision to narrow its reach. The Court assumes such textual changes to have real and substantial effects. *See Stone v. INS*, 514 U.S. 386, 397 (1995).

The government hypothesizes (Br. 30-31) that Congress's textual change could have had the limited purpose of ensuring that persons who use a phone in facilitating misdemeanor regulatory offenses—such as mislabeling a controlled substance, failing to keep records, or unlawfully distributing a schedule V controlled substance—would fall outside the reach of Section 843(b). The terms of Section 843(b), however, exclude the use of a phone in committing or facilitating *any* misdemeanor offense, not just the misdemeanor regulatory offenses identified by the government. There is therefore no textual basis for the government's speculation about the amendment's intended effect.

Moreover, the creation of the simple possession misdemeanor offense was "[o]ne of the most striking" and prominent features of the CSA. 116 Cong. Rec. 33,316 (1970) (Rep. Boland); *see* Pet. Br. 17-18; H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4577 (discussing the misdemeanor change); *id.* at 4584-85 (explaining that Congress was responding to the recommendation of the President's Advisory Commission on Narcotic and Drug Abuse "that the penalty provisions of the federal narcotics and marihuana laws which now prescribe mandatory minimum sentences and pro-

hibit probation or parole be amended to fit the gravity of the particular offense so as to provide greater incentive for rehabilitation"); Congressional Research Service, Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513): Summary of Major Provisions, Report No. 70-257 ED, at 6 (listing the reduction in penalty for first-time users as one of six "substantial revision[s] in previously existing law"). In contrast, the regulatory offenses identified by the government gained mention only in passing, and even then mainly in observing that they were comparable to the simple possession offense, which had the "least severe penalties of all." H.R. Rep. No. 91-1444, 1970 U.S.C.C.A.N. at 4576. If Congress had intended to narrow the statute from "offense" to "felony" in order to exclude only regulatory misdemeanors, and not the most prominent new misdemeanor of simple possession, there presumably would have been some indication to that effect in the legislative materials.

The government's explanation for the textual change in Section 843(b) is unconvincing for another reason. For two of the three regulatory offenses the government identifies—mislabeling a controlled substance and failing to keep records relating to controlled substances—it is difficult to imagine how a communication device would be used in committing or facilitating the offense. The third offense identified by the government—unlawful distribution of a schedule V substance—could be furthered through the use of a phone. But even that offense might fall outside the exclusion on the government's own theory because distribution to a person with a prior conviction would constitute facilitation of that person's felony possession.

"When Congress acts to amend a statute [this Court] presume[s] it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). The amendment should not be interpreted to have effect in only the "rarest of circumstances," *id.* at 397, but should be given "as full a play as possible," *Markham v. Cabell*, 326 U.S. 404, 409 (1945). Interpreting the amendment to exclude from Section 843(b) the class of misdemeanants who were foremost on Congress's mind—persons who buy drugs for personal use—gives the amendment "real and substantial effect" and "as full a play as possible." The government's interpretation, by contrast, would confine it to "the rarest of circumstances."

D. Under The Rule Of Lenity, Any Ambiguity Must Be Resolved In Petitioner's Favor

Under standard principles of statutory interpretation, Section 843(b) does not encompass persons who use a phone in purchasing drugs for personal use. To the extent there is any ambiguity, however, the rule of lenity would require the Court to interpret Section 843(b) to exclude such persons. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *id.* at 2033-34 (Stevens, J., concurring in the judgment).

The government suggests (Br. 31-32) that the rule of lenity applies only when the defendant's conduct is otherwise innocent. That understanding is incorrect. The rule of lenity precludes applying ambiguous statutes to persons simply because they may have violated a different criminal law with lesser punishment. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) ("the rule [of lenity] has been applied

not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing"); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("Th[e] policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958))). That is particularly true here in light of Congress's emphasis on extending leniency and a chance for rehabilitation to misdemeanant drug users. Accordingly, while the government might have been able to charge petitioner with misdemeanor possession for personal use, that possibility affords no basis for expanding Section 843(b) to reach his conduct when the provision's applicability in the circumstances is at least ambiguous.

E. Insofar As The Court Considers The Government's Alternative Argument, The Court Should Reject It

The government begins its brief, not by defending the reasoning of the court of appeals, but instead by urging affirmance of the judgment on an alternative ground not addressed below. Specifically, the government argues (Br. 9-10) that a person who uses a phone in purchasing drugs for personal use has used a communication device in "causing" the seller's "felony" distribution in violation of Section 843(b). Gov't Br. 9-10. That argument, insofar as the Court considers it, lacks merit.

1. The court of appeals grounded its decision solely on the basis that a purchaser of drugs for per-

sonal use "facilitates" the seller's felony. Pet. App. 9a. The court did not address the government's "cause" argument. The government of course may urge any ground in support of the judgment below. But no court of appeals has discussed the government's "cause" argument; and while the government raised the argument in its opposition to the petition, the petition raises only the "facilitate" question, and the Court granted certiorari on that question. In those circumstances, the Court ordinarily refrains from considering an alternative ground for an affirmance. *See, e.g., Archer v. Warner*, 538 U.S. 314, 322 (2003).

2. Should the Court reach the question, it should hold that a person who uses a phone in purchasing drugs for personal use no more uses the phone in "causing" a "felony" distribution than in "facilitating" a "felony" distribution. The very same arguments demonstrating that the use of a phone in purchasing drugs for personal use does not violate the "facilitating" prong of Section 843(b) also demonstrate that it does not violate the "causing" prong.

For instance, the background principle that a purchaser is not a party to a seller's unlawful distribution would preclude liability based on the word "'causing" no less than it precludes liability based on the word "facilitating." Indeed, "cause" liability is simply another form of accessory liability in the aiding-or-abetting statute. 18 U.S.C. § 2(b) ("Whoever willfully causes an act to be done . . . is punishable as a principal."). Thus, just as a purchaser for personal use could not be convicted of "causing" a distribution in violation of 18 U.S.C. § 2, he cannot be

convicted of using a phone "in causing" a distribution in violation of Section 843(b).

Indeed, the statute at issue in *Gebardi* prohibited both "aiding or assisting" the prohibited transportation and "causing" the transportation. *See* 287 U.S. at 118 n.1. The government presumably could not circumvent the Court's holding that a willing participant in the transportation may not be charged with "aiding or assisting" the transportation simply by charging her instead with "causing" the transportation. The same is true here.

Additionally, reliance on "cause" to support the application of Section 843(b) to personal-use buyers would stand at odds with Congress's fundamental distinction between drug dealers and users no less than would reliance on "facilitate." And reliance on the "causing" prong of Section 843(b) could no more be reconciled with the narrowing of Section 843(b) from reaching any drug "offense" to reaching only a drug "felony." Finally, at most, the applicability of the "causing" prong of Section 843(b) in the circumstances is ambiguous, such that the rule of lenity would require the Court to hold that the "causing" prong fails to encompass to a person who uses a phone in buying drugs for personal use.

Significantly, petitioner argued at the certiorari stage that the government had identified no single argument that would allow it to prevail under the "causing" prong if it could not prevail under the "facilitating" prong. Pet. Cert Reply 11-12. In its merits brief, the government again fails to identify any such argument. Accordingly, should the Court reach the argument, it should hold that a person who uses

a phone in purchasing drugs for personal use may not be convicted of a violation under Section 843(b) on the theory that he used a phone "in causing" his seller's "felony" distribution.[8]

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[8] Even if there were some basis for distinguishing "cause" from "facilitate," it would not afford a ground for affirming the judgment below. "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 530 (2008) (*per curiam*) (citing *Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957)). Accordingly, if the Court invalidates the government's facilitation theory, petitioner's conviction must be reversed unless the government proves the error harmless. *See Hedgpeth*, 129 S. Ct. at 532. No such showing could be made here. Assuming that the government's interpretation of the cause prong of Section 843(b) were correct, the jury could have impermissibly found that petitioner's use of a phone made the transaction easier and therefore facilitated it, but that it did not cause the distribution because, even absent the use of a phone, petitioner would have purchased the drugs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: February 25, 2009

AMICUS CURIAE BRIEF

No. 08-192

Supreme Court, U.S.
FILED
JAN 5 — 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALMAN KHADE ABUELHAWA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law ("the Center") is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is the central issue in criminal justice today at all levels of government, there is a dearth of research on how prosecutors exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decision making. The Center is dedicated to identifying the best prosecutorial practices and suggesting avenues of reform. The Center's litigation practice aims to use its empirical research and experience with criminal justice and prosecution practices to assist in important criminal justice cases at all levels, concentrating on cases in which exercises of prosecutorial discretion raise significant substantive legal issues.

SUMMARY OF ARGUMENT

The heart of the federal drug enforcement scheme is the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Act"), which contains a balanced and carefully crafted hierarchy

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

of penalties for drug offenses. Applying Section 843(b) of the Act to the purchase of drugs solely for personal use would fundamentally subvert this scheme in a way that conflicts with the Act's structure and history, frustrates the responsible and ethical exercise of prosecutorial discretion, and invites arbitrary and discriminatory enforcement.

The language and context of Section 843(b) provide compelling evidence that the provision does not – and was never intended to – reach purchasers of drugs for personal use. Section 843(b) is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which draws a sharp distinction between drug distribution, a felony subject to harsh penalties, and personal use of controlled substances, a misdemeanor for which Congress emphasized treatment and rehabilitation, rather than retributive punishment. The lower court's decision fundamentally undermines this pivotal distinction by improperly subjecting purchasers for personal use to harsh penalties reserved for drug traffickers and distributors.

Reading Section 843(b) to reach the drug purchases of simple users like Petitioner also conflicts with the extensive statutory history of Section 843(b), which demonstrates that the provision was intended solely to aid in the apprehension and prosecution of large-scale narcotics traffickers and distributors, whose clandestine use of the telephone enabled them to evade the law by avoiding visible contact with the ultimate buyer. The extensive legislative record of the communication facility provision, on the other hand, contains no reference at all to buyers, because buyers could be

more easily observed, apprehended and prosecuted. The complete statutory history of Section 843(b) – which was not considered by the courts below – thus provides compelling evidence that Congress never intended Section 843(b) to apply to purchasers for personal use.

Reading Section 843(b) to reach purchasers of drugs solely for personal use would have wide-ranging adverse consequences for enforcement of the federal drug laws. Because the telephone and other personal communications devices are a pervasive aspect of modern life and commerce, the lower court's reading of Section 843(b) would transform almost every purchase of drugs for personal use into a felony subject to severe punishment. That reading not only undermines Congress's clear emphasis on lowered penalties and rehabilitation for "simple possession" but, because Department of Justice guidelines direct prosecutors to charge the "most serious" offense applicable to a given case, it will also divert prosecutorial resources from the express legislative priority of combating illegal drug distribution and promotion, and may potentially lead to arbitrary and discriminatory enforcement. Moreover, the lower court's decision will have a staggering impact on the plea bargaining process, giving prosecutors unwarranted leverage to threaten "simple possessors" with lengthy prison sentences, and altering the basic calculus of an accused in deciding whether to proceed to trial.

In sum, the lower court's decision eviscerates the clear statutory distinction between distributors and purchasers, elides the basic concerns that gave rise to Section 843(b) in the first place, and will have

a fundamental and unwarranted impact upon the exercise of prosecutorial discretion and the criminal justice process more generally.

ARGUMENT

I. Permitting Prosecutors to Charge Possessors Under Section 843(b) Is At Odds With The Structure of The Federal Drug Laws.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citation omitted). Section 843(b) is part of a carefully designed drug enforcement scheme, in which Congress drew a sharp distinction between drug distribution, subject to severe punishment, and "simple possession," for which the Act emphasizes rehabilitation and leniency. This statutory structure compels the conclusion that Section 843(b) was never intended to apply to purchasers of drugs solely for personal use.

Prior to 1970, the mere purchase or possession of drugs in small amounts for personal use could result in a felony conviction and harsh penalties. *See, e.g.*, Internal Revenue Code of 1954, Pub. L. No. 591 ch. 736 § 4704(a), 68A Stat. 550 (originally codified at 26 U.S.C. § 4704(a)); Narcotic Drugs Import and Export Act of 1909 ch. 100 § 2, Pub. L. No. 221, 35 Stat 614 (originally codified at 21 U.S.C.

§ 174) (all repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 §§ 101(a)(2), (b)(3)(A), 84 Stat. 1236, 1291-92). Under this pre-1970 regime, small-time drug users were lumped together with narcotics traffickers and large-scale drug distributors; both could be convicted of felonies and punished severely.

In order to treat drug possessors less harshly, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, which "draws a sharp distinction between drug offenses of a commercial nature and illicit personal use of controlled substances." *United States v. Swiderski*, 548 F.2d 445, 449 (2d Cir. 1977); *see also United States v. Martin*, 599 F.2d 880, 889 (9th Cir. 1979) (noting that "[t]he scheme of the Act shows that Congress intended to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties.").

To implement this pivotal policy distinction between distribution and personal drug use, the Act makes drug distribution a felony, punishable by a lengthy term of imprisonment, *see, e.g.*, 21 U.S.C. § 841(b)(1)(A) (distribution punishable by a mandatory *minimum* of ten years imprisonment and a maximum of life imprisonment), while "simple possession" is a misdemeanor, punishable by not more than one year imprisonment. 21 U.S.C. § 844; *see also id.* ("First offenders convicted of simple possession may receive a conditional discharge . . . and upon fulfillment of any terms and conditions the court might impose, their record will be expunged"). This disparity in punishment reflects an

unmistakable congressional determination that drug distribution is a far greater evil than "simple possession," and a clear statutory purpose to treat distributors much more harshly than those who purchase drugs for personal use.

Applying Section 843(b) to one who purchases drugs in small quantity for personal use would turn this carefully drawn statutory distinction on its head by subjecting purchasers to penalties *far greater* than the maximum one year term of imprisonment Congress intended for "simple possession." Not only is a violation of Section 843(b) punishable by four years imprisonment – four times the maximum penalty for simple possession – but the statute also provides that "[e]ach separate use of a communication facility shall be a separate offense under this subsection." 21 U.S.C. § 843(b).

Under the lower court's interpretation, a purchaser who, as a matter of pure happenstance, makes several phone calls to arrange a single purchase is guilty – not of a single misdemeanor punishable by one year imprisonment as provided in Section 844 – but of *multiple felonies*, each punishable by up to *four* years imprisonment. *Id.* Indeed, this case exemplifies how reading Section 843(b) to reach purchasers for personal use is incompatible with treating drug users more leniently than distributors. Petitioner was charged with *seven* counts of violating Section 843(b) for using a telephone to arrange at most *two* meetings to purchase drugs. (JA at 10-15; App. at 17a). Thus, instead of the maximum two years imprisonment he would have faced on two misdemeanor counts of "simple possession" under Section 844, he was

instead subject to seven felony convictions totaling a potential maximum 28 years imprisonment.

Such a result is at war with the clear intent of Congress, as reflected in the text and structure of the Act, which was to moderate the punishment imposed on drug users, and instead focus on treatment and rehabilitation. *See, e.g.*, H.R. Rep. No. 1444 at 10, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4575 ("[T]he rehabilitation of the individual [drug abuser], rather than retributive punishments should be the major objective."); *id.* at 11, 1970 U.S.C.C.A.N. at 4576 ("[P]ossession for personal use . . . involves the least severe penalties of all."); S. Rep. No. 91-613 (1969) at 2 (noting that "the increasingly longer sentences that had been legislated in the past [for drug abuse] had not shown the expected overall reduction in drug law violations").

II. The Statutory History Of Section 843(b) Demonstrates That It Was Never Intended To Be Applied To Purchasers Of Drugs For Personal Use.

Section 843(b)'s extensive statutory history – which was not considered by any of the courts below – further demonstrates that it was directed solely toward drug traffickers and large-scale distributors, and not personal drug users. The communication facility provision was originally enacted – in substantially identical form to Section 843(b) – as part of the Narcotic Control Act of 1956 ("NCA"), Pub. L. No. 84-728 § 1403, 70 Stat. 567 at 573, *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 §

1101(b)(1), 84 Stat. 1236, 1292.[2] The targets of this provision are unmistakable: *"big-time traffickers* [who] are seldom caught and convicted, because . . . [t]heir operations are almost entirely limited to the telephone." S. Rep. No. 84-1997 at 9 (1956) (emphasis added).

Congress has long been concerned with the use of communications facilities by narcotics traffickers and large-scale distributors to evade the law. In the early 1950s – well before Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510 *et seq.*, authorized the use of wiretapping in criminal investigations – the inability

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[2] Section 1403 of the Narcotic Control Act of 1956, titled "Use of communications facilities-penalties," stated:

> (a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit [certain enumerated drug felonies] shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.
>
> (b) For purposes of this section, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication.

Pub. L. No. 84-728, § 1403, 70 Stat. 567, 573 (codified at 18 U.S.C. § 1403).

of prosecutors to obtain admissible evidence against large-scale drug traffickers and distributors was stifling law enforcement efforts to enforce the drug laws. *See* S. Rep. No. 84-1997 (1956). Federal and state law enforcement simply could not obtain convictions of large-scale drug traffickers and distributors whose "operations [were] almost entirely limited to the telephone," and who were therefore able to evade the law by "avoid[ing] all direct contact with the peddlers and ultimate buyers . . . ." *Id.* at 9. To study the problem, Congress convened a Judiciary Subcommittee on Improvements in the Federal Criminal Code, *see* S. Res. 67, 84th Cong. (1955), chaired by Senator Price Daniel.

After extensive hearings, the Daniel Subcommittee initially proposed to address the problem through a limited wiretapping law, *see* S. 3760, 84th Cong. § 1407 (1956) (titled Narcotic Control Act of 1956), but, when confronted with severe opposition from those concerned with its potential impact on civil liberties, *see* 102 Cong. Rec. 9,031-9,047, 9,302 (1956), Congress substituted the present "communication facility" provision as a compromise:

> Mr. DANIEL . . . If the Senator from Oregon . . . can find any other method by which we can get the *top racketeers in the international and national narcotic rackets* without a provision of this kind [-- *i.e.*, permitting wiretapping], I should like to have him suggest it. I would accept such a substitute.

* * *

> Mr. MORSE. . . . We have reached an agreement on the [communication facility] amendment I have offered. It is a substitute for the wiretapping provision of section 1407 in the bill. . . .
>
> Mr. DANIEL. . . . I agree with the Senator from Oregon that he has provided a substitute which is very stringent. It provides heavy penalties. It is the only alternative I can think of which would be helpful in attacking the dope traffic, if the bill does not contain a wiretapping provision. It may be possible, under this substitute, for narcotics agents to reach some of the *dope traffickers who are using telephones to conduct their illicit operations.*

102 Cong. Rec. at 9,042, 9,302-9,303 (emphases added); *see also United States v. Butler*, 204 F. Supp. 339, 343 (S.D.N.Y. 1962) (noting that the communication facility provision "was inserted *in lieu of* a wiretapping provision originally contained in the bill") (emphasis added).

The communication facility provision, like the previously-proposed wiretapping legislation, was thus enacted not because use of a communication facility makes facilitation of a drug felony inherently more culpable, but rather to aid law enforcement efforts against large-scale drug traffickers and distributors, who could evade detection and

prosecution by conducting their illicit activities entirely by phone:

> Although the telephone is the major means of contact between *top narcotic traffickers*, Federal agencies are not permitted, under any circumstances to intercept and divulge messages between the traffickers even though it might produce evidence which would lead to their arrest and conviction . . . .
>
> As a consequence, the United States Government is unwittingly giving narcotics violators, especially the *large racketeers and wholesalers*, a great advantage over Federal law-enforcement officers in their efforts to keep pace with and stamp out the illicit narcotics traffic.

S. Rep. No. 84-1997 at 9 (emphasis added).

Congress focused on narcotics traffickers and large-scale distributors – rather than personal drug users – because it was the large traffickers and suppliers who were able to evade prosecution through their use of the telephone to conduct their illicit trade while staying at a distance from the drugs. By contrast, the drug-addicted purchaser on the street, who could be visually observed purchasing from his dealer and found to be in actual possession of the drugs, presented little problem for law enforcement.

Indeed, this focus upon the traffickers and distributors was echoed by the Department of Justice itself. In subcommittee testimony cited in the Senate report, Assistant Attorney General Warren Olney III testified:

> Because of the covert nature of the narcotics traffic wherein the *big supplier* avoids all possible contact with the ultimate buyer and with the petty pusher or peddler, distribution is usually effected through a conspiratorial network through many intermediaries . . . . In making these arrangements, the telephone is an essential tool which lends itself to clandestine operation . . . .

S. Rep. No. 84-1997 at 9 (emphasis added).

Judge J. Edward Lumbard likewise told the subcommittee that the inability to target large-scale drug distributors through their use of the telephone put law enforcement at a severe disadvantage:

> The narcotics traffic is run by *people who operate on an international scale*, and in this country on an interstate scale. They are *professional criminals*. They have lots of money. They have powerful allies. They have expert knowledge as to how to evade the law and to escape detection. *They are not themselves addicts. In fact, they seldom handle any drugs* . . . .

> Now to get evidence sufficient to convict a *big operator*, as you can see, is very difficult at best. We are dealing with people who operate secretly. They have at their disposal all of the means of modern science and invention and transportation. They use the telephone extensively, and it helps to conceal their identity.

S. Rep. No. 84-1997 at 10 (emphases added).

The NCA's communication facility provision was re-enacted as Section 843(b) fourteen years later and, because there was neither an intent nor effort to change its substance, there is very little contemporaneous statutory history. *See, e.g., United States v. Pierorazio*, 578 F.2d 48, 51 (3d Cir. 1978) (noting the sparse history of Section 843(b)); *see also* S. Rep. No. 91-613, at 3 (explaining that one of the Act's main purposes was to simply "collect the diverse drug control and enforcement laws under one piece of legislation" as a follow-up to the reorganization of drug control agencies carried out under the Johnson Administration in 1968); Drug Abuse Control Amendments – 1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the H. Comm. on Interstate and Foreign Commerce, 81st Cong. 709 (1970) ("[T]his [communication facility provision] is the exact law that is on the books presently . . . . We are trying to codify that law, pull it out of title 18 and put it in this law. *All this is cosmetic*.") (statement of Michael Sonnenreich, Deputy Chief Counsel, Bureau of Narcotics and Dangerous Drugs, Department of Justice) (emphasis added).

Congressional silence upon reenacting the communication facility provision is strong evidence that Congress endorsed and incorporated the provision's prior legislative history into Section 843(b). *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (rejecting statutory construction because "if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it . . ."); *cf. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1541 (2007) (interpreting statutory language consistently with pre-enactment regulations because Congress enacted the legislation "without comment or clarification").

Indeed, there is nothing at all in the history of the Act to suggest that Section 843(b) was intended to apply to drug users. To the contrary, as described above, other provisions of the Act significantly *lowered* the penalties for personal drug use – from felony to misdemeanor status – with a strong legislative emphasis instead upon treatment and rehabilitation. *See* H.R. Rep. No. 1444 at 10, *supra*, 1970 U.S.C.C.A.N. at 4575 ("[T]he rehabilitation of the individual [drug user], rather than retributive punishments should be the major objective."); 21 U.S.C. § 844 ("First offenders convicted of simple possession may receive a conditional discharge . . . and upon fulfillment of any terms and conditions the court might impose, their record will be expunged"). Plainly, the same 1970 Congress that passed the Act did not intend to undermine this important policy by imposing harsh penalties on users through the back door of the communication facility provision which, as demonstrated above, was never intended to apply to users.

Moreover, use of the telephone by purchasers simply does not present the same concerns that motivated Section 843(b). Unlike the large-scale distributors for whom Section 843(b) was intended, purchasers can, without difficulty, be observed handling drugs, searched and then prosecuted based upon physical evidence recovered from their person. And Congress would not have intended to give prosecutors the leverage of felony charges against buyers to induce buyers to cooperate in the government's effort to disrupt the distribution networks targeted by the communication facilities statute. Buyers and addicts are typically less equipped than sellers to aid the government in investigating drug distribution networks and prosecuting high-level distributors because buyers do not interact with individuals high on the distribution chain. *See supra*, S. Rep. No. 84-1997 at 9-10. Section 843(b) was and remains an unnecessary and unwarranted device in the prosecution of purchasers for personal use.

This statutory history conclusively demonstrates that the communication facility provision – first enacted in the NCA and later copied almost verbatim into Section 843(b) of the Act – was intended solely to target large-scale drug traffickers. It was specifically those traffickers and distributors whose use of telephonic communications enabled them to avoid prosecution and detection. And it was that challenge to law enforcement that the communication facility provision was enacted to address. Because Congress did not intend for Section 843(b) to apply to purchasers of drugs for personal use and because such application is at odds with the

structure of the statute as a whole, the Court should reverse the lower court's ruling to the contrary.

III. The Lower Court's Decision Will Affect Nearly Every Prosecution For Drug Possession And Give Prosecutors Power In Excess Of That Intended By The Statute.

Interpreting Section 843(b) to reach purchasers of drugs solely for personal use will have profound adverse consequences on the sound exercise of prosecutorial discretion and enforcement of the federal drug laws. As Section 843(b)'s statutory context and history make clear, the provision was intended solely to address difficulties in investigating and prosecuting large scale distributors, who could avoid detection through the clandestine use of electronic communications. Contrary to this narrow purpose – and contrary to the Act's express objective of treating "mere possession" less harshly than other drug crimes – the lower court's reading would broadly require prosecutors to charge anyone who arranges to purchase drugs for personal use by telephone under Section 843(b). On the other hand, failure by prosecutors to apply Section 843(b) consistently – as is likely if interpreted improperly to reach purchasers for personal use – would raise the specter of arbitrary or discriminatory enforcement.

A. The Lower Court's Decision, In Combination With Department of Justice Charging Policy, Will Eviscerate The Statutory Distinction Between Sellers And Buyers And May Lead To Arbitrary And Discriminatory Enforcement.

The Department of Justice's charging policy directs prosecutors, *inter alia*, to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . ." Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors at 2 (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm. This policy is firm and well established and, if applied rigidly, requires a federal prosecutor seeking to charge something other than the most serious, readily provable offense to both demonstrate that the case falls within one of a handful of "Limited Exceptions," *id.*,[3] and to obtain approval from an Assistant Attorney General, United States Attorney, or designated supervisory attorney.

As of 2006, there were in excess of 233,000,000 cellular telephone subscribers in the United States. U.S. Census Bureau, *Statistical Abstract of the United States*, t. 1120 (2008), *available at*

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[3] The exceptions are: (1) cases in which the sentence would not be affected; (2) cases subject to "Fast Track" treatment; (3) post-indictment reassessment that the most serious offense is not readily provable; (4) substantial assistance by the defendant; (5) selected circumstances in which a prosecutor need not seek a statutory enhancement; and (6) other rare and exceptional circumstances. *Id.*

http://www.census.gov/compendia/statab/2008edition.html. Given the proliferation of cellular telephones and other "communication facilit[ies]" since the enactment of Section 843(b), virtually every possessor for personal use is likely, in connection with his or her purchase of the drugs (as with virtually all other aspects of life), to use some type of communication facility. Thus, notwithstanding the firm line Congress drew between drug possessors and distributors, the Department of Justice's charging policy will likely cause federal prosecutors to bring felony charges under Section 843(b) against many simple possessors of illegal narcotics, thereby eviscerating the distinction between such offenders that is embedded in the statute.

On the other hand, if the large number of possessors swept within a broadened Section 843(b) leads federal prosecutors to disregard the Ashcroft Memorandum, Section 843(b) may be applied haphazardly, arbitrarily, and possibly discriminatorily. The purpose of the Ashcroft Memorandum is to promote uniformity. If it is disregarded, nothing would guide prosecutors when deciding which defendant to charge with the more serious offense.

Contrary to the Government's argument, excluding purchases for personal use from the scope of Section 843(b) would not "denude" the provision of practical effect. Br. in Opp. at 8. While those who facilitate drug distribution to others can be charged as aiders-and-abettors, Section 843(b) provides additional enforcement and prosecution advantages not available under the aiding-and-abetting statute. First, because "[e]ach separate use of a

communication facility" is a "separate offense" under Section 843(b), the provision allows prosecutors to charge Section 843(b)'s intended targets – *i.e.*, drug distributors – with *multiple* felony counts relating to a *single* felony act. Moreover, Section 843(b) gives prosecutors the flexibility to offer a defendant charged with distribution or possession with intent to distribute, but who may be difficult to convict, the opportunity instead to plead guilty to a violation of Section 843(b), which may be more readily provable and which carries a lower statutory maximum. Section 843(b) will remain an important tool in countering drug distribution without expanding its scope – well beyond what Congress intended – to reach purchasers for personal use.

B. Prosecutors Will Wield Unwarranted Power in the Plea Bargaining Process.

It is beyond doubt that the overwhelming majority of federal criminal proceedings are resolved via a guilty plea. U.S. Sentencing Commission, *2007 Sourcebook of Federal Sentencing Statistics*, Figure C, *available at* http://www.ussc.gov/ANNRPT/2007/FigC.pdf (reporting that more than 95% of convicted defendants in federal criminal proceedings pleaded guilty). In nearly every federal criminal proceeding, then, the plea bargain plays a crucial role in determining the punishment ultimately imposed. *See Wright v. Van Patten*, 552 U.S. __, 128 S. Ct. 743, 748 (2008) (Stevens, J. concurring) (acknowledging that "plea bargaining [is] the norm and trial the exception").

It is a well recognized fact that plea bargaining does not occur in a vacuum, but instead "takes place in the shadow of (*i.e.*, with an eye toward the hypothetical result of) a potential trial." *United States v. Booker*, 543 U.S. 220, 254 (2005) (Breyer, J.). In other words, the outcome of a plea bargain reflects, among other things, the views of both prosecutor and defendant regarding the likelihood and severity of a negative result should a trial occur. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992) (explaining that going to "trial means . . . tak[ing] the risk of conviction or acquittal; risk-averse persons prefer a certain but small punishment to a chancy but large one."); *see also* Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1920 (1992) (discussing the impact on plea bargaining when there is a "large differential between post-trial and post-plea sentences").

Notwithstanding Congress's express intention to treat drug use as a misdemeanor, the lower court has placed the specter of a felony conviction and a substantially lengthier term of incarceration over a drug possessor's head, and thereby given prosecutors an enormous and unwarranted amount of leverage in plea negotiations with defendants charged with possessing drugs for their own use. Specifically, the lower court's interpretation of Section 843(b) increases the maximum term of imprisonment facing the typical possessor by 400%. By drastically increasing the potential maximum penalty, the lower court has fundamentally altered the calculus that must be performed by an accused, and in so doing,

has given prosecutors unwarranted leverage in plea negotiations.

The impact on plea negotiations resulting from the lower court's ruling is significant. Under the congressionally-imposed scheme – in which it established different punishments for possessors and distributors – it is not difficult to imagine a possessor who would be willing to exercise his or her constitutional rights, and require the prosecution to prove its case beyond a reasonable doubt at trial. Such a defendant might, after consulting with counsel and evaluating the evidence, deem the prosecution's case to be sufficiently weak such that the benefits of trial outweigh the perceived risk of a loss. And in some number of these cases, the defendant would prove successful – *i.e.* the jury would find that the government had not met its burden, and it would acquit the defendant.

Under the scheme imposed by the lower court, it is not difficult to imagine that same defendant – presented with the same underlying facts but faced with a 400% harsher punishment upon a loss at trial – opting to plead guilty. This defendant might do so notwithstanding the fact that, in at least some instances, he or she would have been acquitted at trial. Of course, this risk exists whenever a defendant pleads guilty, but the dramatically higher penalty facing a possessor under the lower court's interpretation of Section 843(b) increases this risk and places a thumb on the scale in favor of a plea. The lower court's decision would thus fundamentally alter the plea bargaining process – and virtually every federal criminal case involving possession of narcotics – by giving prosecutors the power to

prosecute crimes beyond what Congress intended and provided.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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JANUARY 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

No. 08-192

IN THE

Supreme Court of the United States

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Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the use of a telephone to buy drugs for personal use "facilitates" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony).

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association working in the interest of criminal defense attorneys and their clients.[1] NACDL was founded to ensure justice and

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other

due process for persons accused of crimes and other misconduct. NACDL has more than 12,800 members—joined by 94 affiliate organizations with 35,000 members—including criminal defense lawyers, active U.S. military defense counsel, and law professors committed to preserving fairness within America's criminal justice system.

The decision under review held that, although acquiring illicit drugs for personal use is ordinarily a misdemeanor under the federal drug laws, anyone who uses a cell phone (or any other "communication facility") in acquiring illegal narcotics for personal use may be charged with a felony offense punishable by up to four years of incarceration for each call. According to the government, such conduct violates 21 U.S.C. § 843(b) because buying narcotics, even for personal use, *facilitates the seller's distribution* of drugs, a felony. That ruling is of vital importance to NACDL and its members, who routinely represent criminal defendants facing federal drug charges. Given the increasingly pervasive use and extraordinary mobility of today's "communication facilit[ies]," the ruling threatens to turn almost any personal-use purchase into a felony offense. That does not merely contravene Congress's intent, which was to distinguish sharply between drug users and drug distributors. It also undermines efforts to ensure that drug users receive the treatment and opportunities that will maximize the likelihood of their rehabilitation and reintegration as useful members of society. NACDL thus has a unique perspective on, and a keen interest in ensuring, proper resolution of the question presented con-

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than *amicus* and its counsel made such a monetary contribution. Both parties have consented to the filing of this brief. The parties' letters so consenting have been filed with the Clerk's office.

sistent with equitable and evenhanded administration of the federal drug laws.

SUMMARY OF ARGUMENT

I. Section 843(b) of Title 21 makes it a felony to use a "communication facility," such as a cell phone, in "facilitating" the commission of a "felony" violation of the federal drug laws. In this case, the government would read § 843(b) as converting every misdemeanor purchase of a small quantity of drugs for personal use into a felony whenever the purchaser employs a "communication facility" in making the purchase. But the government does not rest that construction on the theory that personal-use purchasers necessarily employ communication facilities to facilitate *their purchases*. Nor could it: To violate § 843, the communication facility must be used to facilitate a *felony*; obtaining drugs for personal use is generally a *misdemeanor*. Instead, the government contends that, when a buyer uses a phone or communication facility in connection with a drug purchase, he is facilitating the *drug dealer's* distribution, a felony.

That strained construction of § 843(b) cannot be reconciled with ordinary meaning or common sense. When Congress overhauled this Nation's drug laws in 1970, it sharply distinguished between users and sellers, focusing on rehabilitating the former while reserving the harsh consequences of felony conviction for the latter. The government's construction is not merely contrary to that careful effort; it would destroy the effort entirely. In today's electronic and mobile society, cellular telephony, texting, e-mail, and other uses of communication facilities pervade our day-to-day lives (particularly among the youth). The government's over-expansive reading of § 843(b) thus threatens to turn virtually every personal-use acquisition into a federal felony, contravening Congress's intent. Section 843(b)'s text, structure, history, and purpose simply cannot bear that result.

A. The government's construction relies critically on the notion that the misdemeanor purchase of illegal narcotics can be viewed as "facilitating" the seller's felony distribution. This Court, however, has already rejected the argument that a buyer's purchase "facilitates" the seller's sale. In *United States* v. *Rewis*, 401 U.S. 808, 811 (1971), the Court explained that patronizing a gambling establishment does not "facilitate" the crime of operating such an establishment. That conforms with ordinary meaning. A shopper at Wal-Mart does not facilitate—*i.e.*, make easier, aid, or assist—that institution's retail operations (at least so long as he does not do anything unusual like operate the register for the cashier or assist other customers). More to the point, a shopper who calls Wal-Mart to find out its hours, or determine whether a particular item is in stock, would not ordinarily be thought to have used his phone in "facilitating" Wal-Mart's retail sales as opposed to facilitating his own purchases. There is a difference between assisting an operation and patronizing it. If Congress had meant to include the latter in § 843(b), it would have said so. It did not.

The government's construction violates other canons of statutory construction as well. When Congress amended § 843(b) in 1970, it introduced the requirement that the use of the communication facility aid or assist the commission of a *felony* violation of the federal drug laws. The government's theory converts that felony violation requirement into virtual surplusage. Indeed, it threatens to convert every personal-use acquisition from a misdemeanor into a felony whether it involves a communication facility or not.

B. The government's theory also contravenes the Act's structure and purpose. In 1970, Congress drew a clear and intentional line between drug users and drug dealers, promoting rehabilitation for the former and

imposing incarceration on the latter. The government's construction would erase that line and turn back congressional drug policy by 40 years. Communications technology is ubiquitous. Whether walking, driving, riding on the subway, or just sitting in the park, people are constantly using cell phones to talk, text message, or e-mail. An expansive reading of § 843(b) could transform all of those individuals into felons if they make even a one-time mistake of buying drugs for personal use and use a cell phone in the process. There are dramatic differences between a felony conviction and a misdemeanor violation. Congress intended to impose the draconian consequences of felony conviction on those who distribute illegal narcotics, not on those who merely acquire them for personal use, even if they employ a phone or other communications device in doing so.

II. Even if the text, structure, and purpose of Section 843(b) do not dictate that "facilitate" be given its ordinary meaning, the rule of lenity does.

ARGUMENT

The use of communication facilities pervades our daily lives. The simple telephone of yesteryear has been supplemented and often displaced by a dizzying array of communication devices and associated facilities, including the now-ubiquitous cell phone, text-message, e-mail, pager, and fax. In virtually any location or activity—whether at the office, at home, while driving, traveling, sitting on the subway, sitting in a park, at a coffee shop, or in a classroom—people use those devices to conduct their daily affairs.

In this case, the government contends that anyone who obtains illegal drugs for personal use, itself a misdemeanor, instantaneously becomes guilty of a felony violation of 21 U.S.C. § 843(b) if he or she uses a cell phone (or any other "communication facility") in doing so.

Section 843(b), however, provides that it is a felony punishable by up to 4 years of incarceration to use a "communication facility" in "facilitating" the commission of a "*felony*" violation of federal drug laws. Buying drugs for personal use is a misdemeanor, not a felony. Nonetheless, the government claims that using a cell phone to purchase drugs for personal use violates § 843(b) because it "facilitates" *the seller's* commission of felony *distribution*. The text, structure, and history of § 843(b), however, simply do not support that staggeringly expansive view of § 843(b).

As a matter of plain text and common understanding, the purchaser's act of buying (or actions preparatory to buying) goods from a seller does not "facilitate" the seller's distribution. To "facilitate" means to aid, assist, or make easier. There is an enormous difference between merely patronizing a seller and aiding or assisting him. When Congress overhauled the federal drug laws in 1970, moreover, it adopted a new approach to the war on drugs, sharply distinguishing between drug users and drug dealers with respect to punishment. Purchasers of small quantities of drugs for personal use were no longer treated as felons, but were instead reclassified as misdemeanants to allow for rehabilitation in place of lengthy periods of incarceration. The government's theory is at war with that effort, for it threatens to convert virtually every drug user from a misdemeanant into a felon. To the extent any residual doubt regarding the scope of § 843(b) remains, it should be resolved in favor of lenity.

I. Purchase Of Drugs For Personal Use Does Not "Facilitate" Commission Of A Felony

Since 1970, this Nation's drug laws have focused on distinguishing between drug users and drug dealers. While those who distribute illegal narcotics face the harsh consequences of felony conviction, the purchase of small quantities of drugs for personal use is a misde-

meanor offense, and users are treated in the first instance as requiring rehabilitation rather than lengthy incarceration. The text, structure, and history of § 843(b) preserve that careful distinction between users on the one hand and distributors on the other. The government's over-expansive construction of § 843(b) would obliterate it.

A. The Ordinary Meaning Of The Term "Facilitate" Does Not Encompass Purchases For Personal Use

Any statutory analysis must "look first to the language of the statute itself." *Hughey* v. *United States*, 495 U.S. 411, 415 (1990). In analyzing the statutory text, courts do not read individual words in isolation. Rather, "the words of a statute must be read in their context with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (statutory language should be interpreted consonant with "the provisions of the whole law, and * * * its object and policy") (internal quotation marks omitted). In this case, § 843(b)'s plain text makes clear that it does not reach individuals who use cell phones and the like to make misdemeanor purchases of narcotics for personal use.

1. By its terms, § 843(b) makes it a felony for "any person knowingly or intentionally to use any communication facility" (including land-line telephones, cell phones, and e-mail) "*in committing or in causing or facilitating* the commission of any act or acts constituting *a felony*" under the federal drug laws. 21 U.S.C. § 843(b) (emphasis added). Thus, to violate Section 843(b), the defendant must do two things. First, he must "commit[]" or "caus[e] or facilitat[e] the commission of * * * a felony" violation of the federal drug laws. Second, he must have

"knowingly or intentionally" "use[d] any communication facility" in doing so. The government's effort to expand the scope of § 843(b) to encompass individual purchases for personal use fails at the first step because such purchases do not "facilitate" the commission of a felony offense.

There is no dispute that a person who purchases drugs for personal use does not "*commit* * * * any act or act constituting a felony" violation of the federal drug laws. To the contrary, possession of illegal narcotics for personal use is a misdemeanor violation. 21 U.S.C. § 844. As explained below, Congress amended the drug laws in 1970 for the specific purpose of making possession for personal use a misdemeanor, reserving the harsh consequences of felony conviction for those who traffic in narcotics. See pp. 14-15, *infra*.

For that reason, the government and the court below both invoked § 843(b)'s "facilitating" language. See Pet. App. 9a; Br. in Opp. 10. But they do not claim that a defendant who uses a cell phone to purchase narcotics for personal use "facilitates" his own misdemeanor possession. Instead, they urge that such a defendant "*facilitates* * * * a felony" because, in buying drugs, a purchaser facilitates the *dealer's* felony of narcotics distribution. That strained position, however, cannot be squared with the ordinary meaning of the term "facilitate," both generally and within the criminal law. To "facilitate" an act, one must "make [it] easier or less difficult," or "assist" or "aid" it. *Webster's Second New Int'l Dictionary* 908 (2d ed. 1954). It is well established that being a patron of an illegal activity does not "facilitate" it. See *Rewis*, 401 U.S. at 811. Being a purchaser does not make the activity "easier" or "assist" or "aid" it; rather, it merely makes the buyer a counterparty to the illegal transaction.

In *Rewis*, for example, this Court addressed the meaning of the Travel Act, 18 U.S.C. § 1952, which prohibits interstate travel with the intent to "promote, manage, establish, carry on, or facilitate" certain kinds of illegal activity. See 401 U.S. at 811. The defendants in *Rewis* were operators of a gambling establishment that was patronized by out-of-state customers. *Rewis* v. *United States*, 418 F.2d 1218, 1220 (11th Cir. 1969). Although the lower court overturned the convictions of the customers of the gambling establishment under § 1952, it upheld the convictions of the proprietors based on their agreement "to operate a lottery which would be 'facilitated' by being patronized by persons coming to it." *Id.* at 1221. This Court reversed. Starting with the statutory text, the Court held that "the ordinary meaning of this language suggests that the traveler's purpose must involve *more than the desire to patronize illegal activity*." 401 U.S. at 811 (emphasis added). Turning to the legislative history, the Court found no indication that the reach of § 1952 was meant to turn on whether gambling patrons happened to travel in interstate commerce. *Id.* at 811-12. The Court noted that construing the Travel Act to reach the defendants' conduct, solely because their illegal activity was patronized by out-of-state customers, "might well produce situations in which the geo-graphic origin of customers, a matter of happen-stance, would transform relatively minor state offenses into federal felonies." *Id.* at 812.

That same analysis controls here. Just as the customer of a gambling establishment does not "facilitate" the illegal gambling operation under *Rewis*, the personal-use purchaser of drugs does not facilitate the drug dealer's felony distribution. Nor does anything in the legislative history suggest that Congress intended to convert every personal-use purchaser who happens to use a phone from a misdemeanant into a federal felon.

To the contrary, the legislative history makes clear that Congress did *not* intend that result. "If the abuser is to be penalized, he should not be penalized in the spirit of distribution." H.R. Rep. No. 91-1444, at 9 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4575.[2]

The government's position also fails as a matter of ordinary meaning. For example, a Wal-Mart customer is unlikely to claim that he is "facilitating"—*i.e.*, making easier, aiding, or assisting—Wal-Mart's retail sales operations merely by choosing to shop there (unless the customer also assists other customers or fixes a broken cash register while shopping). Likewise, if a customer uses the Internet to check Wal-Mart's hours, phones ahead to determine if an item is in stock, or uses a cell phone while in the store to check with the spouse about items on the shopping list, no one would think that the customer had used a communications facility to facilitate *Wal-Mart's* activities. The shopper may have used the phone or the Internet to facilitate his own shopping. But he would not have used them to facilitate Wal-Mart's operations. As a matter of common understanding, we all recognize that shoppers do not "facilitate" a retailer's

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[2] The government argues that this Court's construction of "facilitate" in *Rewis* was strongly influenced by the words surrounding the term "facilitate." Br. in Opp. 7 n.2. According to the government, the term "facilitate" in the Travel Act was preceded by specific words; here, the government urges, the term "facilitate" is preceded by the general verb "cause" in § 843(b). *Ibid.* That argument does not withstand scrutiny. In both the Travel Act and in § 843(b), the term "facilitate" operates as a catch-all that encompasses not merely commission of the offense but assisting others in committing the offense. Besides, the government's argument effectively concedes ambiguity—that "facilitating" another's illegal activity does not necessarily include merely being a patron. Here, all of the canons of statutory construction require that ambiguity to be resolved against the government's position.

operations—they patronize it. There is no reason for a different result merely because the seller distributes narcotics rather than t-shirts and electronics.

2. That same understanding is reflected throughout the criminal law. The term "facilitate" is most readily understood as synonymous with the phrase "aid and abet." Black's Law Dictionary, for example, defines the term "aid and abet" as "[t]o *assist or facilitate* the commission of a crime." *Black's Law Dictionary* 76 (8th ed. 2004) (emphasis added). It is well established that a personal-use purchaser does not aid or abet the seller's sale. See Pet. Br. 25-28; *United States* v. *Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977); *United States* v. *Harold*, 531 F.2d 704, 705 (5th Cir. 1976); *Lott* v. *United States*, 205 F. 28, 29-31 (9th Cir. 1913).[3] By the same token, a personal-use purchaser does not "facilitate" the seller's felony distribution merely by making a purchase. See *Dixon* v. *United States*, 548 U.S. 1, 17 (2006) (Kennedy, J. concurring) (stating that Congress enacted § 843(b) against "background understandings set forth in judicial decisions."). The purchaser does not "aid" the distribution, "assist" it, or make it "easier"; he merely acts as a customer of it. See *United States* v. *Binkley*, 903 F.2d 1130, 1138 (7th Cir. 1990) (Cudahy, J., dissenting). Particularly given Congress's intent to distinguish between users on

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[3] Numerous state courts have reached a similar conclusion interpreting their own drug laws. See *Brown* v. *State*, 203 So. 2d 700 (Ala. Ct. App. 1967); *Howard* v. *State*, 496 P.2d 657, 660 (Alaska 1972); *State* v. *Cota*, 956 P.2d 507, 509-10 (Ariz. 1998); *Sweatt* v. *State*, 473 S.W.2d 913, 914-15 (Ark. 1971); *People* v. *Mimms*, 110 Cal. App. 2d 310, 314 (1952); *Sobrino* v. *State*, 471 So. 2d 1333, 1335 (Fla. Dist. Ct. App. 1985); *Gamble* v. *State*, 62 S.E. 544 (Ga. Ct. App. 1908); *State* v. *Payton*, 45 Idaho 668, 670-71 (1928); *Wakeman* v. *Chambers*, 28 N.W. 498, 499 (Iowa 1886); *Dunaway* v. *Commonwealth*, 39 S.W.2d 242, 242 (Ky. Ct. App. 1931); *State* v. *Celestine*, 671 So. 2d 896, 897-98 (La. 1996).

the one hand and sellers on the other—and to reserve felony conviction for the latter—there is no reason to think Congress intended to depart from that ordinary understanding of the term "facilitate" so as to make every drug user who employs a phone in making a purchase a felon under § 843(b).

Indeed, such an expansive interpretation would effectively gut the distinction between users and sellers throughout the federal drug laws without regard to the use of communications facilities. If the purchaser of a personal-use quantity of drugs "facilitates" the seller's felony distribution, then such a purchaser might also be said to aid and abet that distribution. As noted above, "aid or abet" *means* to "assist or facilitate." Under the federal aiding-and-abetting statute, however, anyone who "aids and abets" another's commission of "an offense against the United States" is "punishable as a principal." 18 U.S.C. § 2(a). The government's view could thus convert *every* purchaser of personal-use drugs into a felon—each such purchaser could be liable not merely as a personal-use purchaser but as a principal in narcotics trafficking for having aided or abetted his source's felony distribution. Congress clearly did not intend that absurd result. It intended to subject purchasers and traffickers to different treatments and penalties. See H.R. Rep. No. 91-1444 at 10, *reprinted in* 1970 U.S.C.C.A.N. 4515.

3. The government's effort to define "facilitate" expansively also offends the cardinal principle of statutory construction that a court should "give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (citation omitted); see also *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116 (1879) ("a statute ought * * * to be so construed" if possible so that "no clause, sentence, or word shall be superfluous, void, or insignificant"). The "resistance" against treating language as superfluous is "heightened"

where, as here, "the words describe an element of a criminal offense." *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994).

Here, the government's expansive reading of "facilitate" would render Congress's use of the word "felony" all but meaningless. As petitioner explains (at 23), § 843(b)'s predecessor did not distinguish between facilitating felonies and facilitating misdemeanors. Instead, it prohibited the use of a communication facility to facilitate "any act or acts constituting an offense" under federal drug laws. Narcotics Control Act § 201, 70 Stat. at 573 (codified at former 18 U.S.C. § 1403 (repealed)). Because most drug offenses at the time were classified as felonies, see Pet. Br. 23, there was little reason for Congress to distinguish between facilitating felonies and facilitating misdemeanors. But once Congress revamped the drug laws in 1970 to treat drug users and drug dealers differently, it became necessary to treat them differently under § 843(b) as well. Congress implemented that distinction by narrowing § 843(b), replacing the term "offense" with the word "felony." *Id.* at 24. In doing so, Congress made clear that § 843(b) reaches only uses of communication facilities that facilitate *felony* offenses—not *any* offense.

The government's construction renders that important change superfluous or nearly so. Nearly every purchase of drugs for personal use somehow "makes it easier" for someone else to distribute drugs in the over-expansive sense in which the government uses those terms. The government thus would make almost every use of a phone in committing a misdemeanor violation of the federal drug laws fall within § 843(b). Such a construction thus makes the careful limit Congress added in 1970—that the use of the communications facility facilitate a *felony*—"superfluous" or at least "insignificant,"

something this Court should decline to do. *Hoffman*, 101 U.S. at 115.

B. The Government's View Defies The Structure And Purpose Of The Federal Drug Laws By Turning Virtually Every Purchaser Into A Felon

"To discern Congress's intent," this Court examines not merely the "the explicit statutory language" but also "the structure and purpose of the statute." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990). Here, the Act's structure and purpose defy the government's position. Congress intended to distinguish sharply between drug users and drug dealers, humanely addressing the former through treatment and rehabilitation while punishing the latter through incarceration. The government's over-expansive reading of § 843(b) does not merely offend that effort. It does so *en mass*, threatening to convert virtually every drug user from a misdemeanant into a felon; creating nonsensical distinctions; and denying drug users the effective opportunity for treatment and rehabilitation that Congress intended to give them.

1. When Congress crafted the Comprehensive Drug Abuse Prevention and Control Act—including Section 843(b)—it sought "to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *United States* v. *Martin*, 599 F.2d 880, 889 (9th Cir. 1979). Congress adopted the philosophy of the President's Advisory Committee on Narcotic and Drug Abuse (the "Prettyman Commission"), established by President Kennedy in 1963. *Swiderski*, 548 F.2d at 449; see H.R. Rep. No. 91-1444, at 8-10, *reprinted in* 1970 U.S.C.C.A.N. 4574-4575. Although the Prettyman Commission proposed strong measures to combat drug trafficking, it advocated lesser penalties for individual drug abusers in order to promote rehabilitation. *Id.* at 10, *reprinted in* 1970 U.S.C.C.A.N. 4575 ("[T]he rehabilita-

tion of the individual [drug user], rather than retributive punishment, should be the major objective."). Congress sought to punish commercial trafficking and distribution more harshly because "such conduct tends to have the dangerous, unwanted effect of drawing additional participants into the web of drug abuse." *Swiderski*, 548 F.2d at 450; 116 Cong. Rec. 33,647 (1970) (statement of Rep. Sisk) (stating that the new legislation draws "a distinction between the unfortunate user or addict of narcotics and * * * [t]he dealer or pusher who reaps huge financial benefits from the misery of the user").

As a result, simple possession, or possession for personal use, is classified as a misdemeanor, 21 U.S.C. § 844, while possession with intent to distribute is a felony, 21 U.S.C. § 841. That distinction reflects the judgment that personal use, a misdemeanor, "does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in * * * drug distribution." *Swiderski*, 548 F.2d at 450; 116 Cong. Rec. 33,307 (1970) (statement of Rep. Robison) (stating that the legislation "recognizes that the mere use of dangerous drugs is more of a sickness" and that individuals who "merely use or possess drugs for their personal use, and who are caught, should not have their futures ruined"); H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4575 ("The illegal traffic in drugs should be attacked with the full power of the federal government" and "[t]he price for participation in this traffic should be prohibitive."). That distinction is also critical to Congress's effort to provide better opportunities to rehabilitate drug users. See H.R. Rep. No. 91-1444, at 8-10, 18-19, *reprinted in* 1970 U.S.C.C.A.N. 4574-75, 4584-85.

2. The government's construction would eviscerate that distinction, with devastating results. Under the government's approach, all drug users—purchasers of personal-use quantities—would become felons whenever

they employ a phone, cell phone, or other means of electronic communication in acquiring drugs. In today's mobile and digital society, however, electronic communications are used by virtually everyone in almost every aspect of daily life. Cell phones, e-mail, text messages, and instant messaging are rapidly displacing in-person communications for almost every sort of interaction. In the last five years, the number of mobile wireless telephone subscribers grew by almost 100 million; almost everyone has one.[4] E-mail proliferates.[5] Internet usage is ubiquitous as well.[6]

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[4] Compare FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Chart 11.3 (2008) (241,945,000 subscribers per Form 502), *avail. at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf, with FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Table 11.1 (2003) (141,776,000 subscribers per Form 502), *avail. at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend803.pdf. The impact of the cell phone is everywhere. Local convenience stores sell pre-paid phones that require no contract. Ben Charny, *7-11 Rings in Cell Phone Service*, Apr. 27, 2004, *avail. at* http://news.zdnet.com/2100-9584_22-135741.html. Movie theater owners have petitioned the FCC to allow owners to block cell phone service in theaters. *Movie Theater Owners Want Cell Phones Blocked*, Dec. 19, 2005, *avail. at* http://www.mobiledia.com/news/41645.html. States, including the District of Columbia, have started to ban the use of cell phones while driving. See Governors Highway Safety Association, Summary of State Laws, *avail. at* http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html. Many courts now have explicit policies regarding cell phone use and possession, see, *e.g.*, Gabrielle Banks, *Judges Ban Cell Phones, Camera Near Criminal Trials in Courthouse*, Pittsburgh Post-Gazette, Nov. 30, 2007, even going as far as to prohibit certain types of phones but not others, see, *e.g.*, Standing Order re Use of Cellular Telephones in Courthouses and Courtrooms (W.D. Tex. Aug. 1, 2003).

[5] More than half of working adults in the United States have both a personal and a work email account. Mary Madden & Sydney Jones,

Perhaps most significantly, text-messaging has shown astronomical growth over the past few years. Just 10 years ago, text-messaging was virtually unheard of in this country. According to the Cellular Telephone Industry Association (CTIA), Americans sent 57.2 billion text messages in 2005 and now send more than ten times that amount—about 600.5 billion text messages—a year. See CTIA Wireless Quick Facts, http://www.ctia.org/media/ /index.cfm/AID/10323.[7] With most of that growth among America's youth,[8] the text message has basically replaced

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PEW Internet & American Life Project, Networked Workers 20 (2008) *avail. at* http://www.pewinternet.org/pdfs/PIP_Networked_Workers_FINAL.pdf. Of working adults under 30, 20% report having three or more personal email accounts. *Ibid.* Microsoft and Yahoo, the market leaders in free webmail, have 256.2 million and 254.6 million subscribers, respectively. Jefferson Graham, *E-mail Carriers Deliver Gifts of Nifty Features To Lure, Keep Users*, USA Today, April 16, 2008.

[6] On average, Americans now spend 26 hours and 26 minutes per month using the Internet. Gary Holmes, The Nielsen Company, Press Release, *Nielsen Reports TV, Internet and Mobile Usage Among Americans*, July 8, 2008, *avail. at* http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=fe63c9769fcfa110VgnVCM100000ac0a260aRCRD.

[7] By contrast, in 2000, the total number of text messages sent in the United States was less than .003 percent of that total, or about 14.4 million. Reuters, *Text Messaging Use in South Carolina Soars by Nearly 500 Percent*, July 23, 2008, *avail. at* http://www.reuters.com/article/pressRelease/idUS210860+23-Jul-2008+PRN20080723.

[8] Teens send, on average, 455 text messages and receive 467 messages each month; they thus send and receive about 15 or 16 text messages a day. Reuters, *Text Messaging Improves Parent-Teen Relationship*, April 16, 2008, *avail. at* http://www.reuters.com/article/pressRelease/idUS117578+16-Apr-2008+BW20080416. Consumers most likely to send and receive text messages are those between 13 and 24 years old. Margaret Webb Pressler, *For Texting Teens, an OMG Moment When the Phone Bill Arrives*, Wash. Post, May 20, 2007, at A1. As of 2006, 65% of people ages 18-29 used their cell phones for text messaging, compared with 37% of people ages

the whisper as the preferred means of communicating during class.[9] Given the pervasiveness and constant use of communications facilities, the government's approach threatens to turn virtually all purchases into felony offenses.

That approach, moreover, would radically alter the culpability associated with infrequent, experimental drug use, particularly among the Nation's youth. For example, under the government's construction of § 843(b), a student's text-messaged inquiry about his neighbor's willingness to bring his ecstasy to a party and share it—"R U able to brng X to prty tnite" or "can U bring?"—would become a potential federal felony.[10] It is hard to see why the individual who obtains a personal-use quantity of drugs by whispering an inquiry about its availability to his neighbor in class should be guilty of a

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30-49, 13% of people ages 50-64, and 8% of people 65 and older. Lee Rainie, *PEW Internet & American Life Project, PEW Internet Project Data Memo* 6 (2006), *avail. at* http://www.pewinternet.org/pdfs/PIP_Cell_phone_study.pdf. About 85 percent of teens ages 12-17 engage in some form of electronic communication, including text messaging, sending email, or instant messages. Amanda Lenhart *et al.*, *Pew Internet & American Life Project, Writing, Technology and Teens* 24 (2008), *avail. at* http://www.pewinternet.org/pdfs/PIP_Writing_Report_FINAL3.pdf.

[9] See Tony Gonzalez, *Know Your Text-Messaging Limits Before Being Caught at School*, Minneapolis Star Tribune, Sept. 4, 2008, at E1; Lisa Guernsey, *When Gadgets Get in the Way*, N.Y. Times, Aug. 19, 2004, at G1.

[10] Some courts have held that sharing narcotics with a friend can be a felony. See, *e.g.*, *Washington* v. *United States*, 291 F. Supp. 2d 418, 436 (W.D. Va. 2003) ("Sharing with friends is distribution, and it is no defense that Washington did not know that his acts would be considered distribution under 21 U.S.C. § 841(a)."); see also *United States* v. *Wallace*, 532 F.3d 126, 128-129 (2d Cir. 2008); *United States* v. *Washington*, 41 F.3d 917, 919 (4th Cir. 1994); *United States* v. *Ramirez*, 608 F.2d 1261, 1264 (9th Cir. 1974).

misdemeanor, while the person who texts the same inquiry to the same neighbor should be guilty of a felony.

The government's construction would not merely turn those youths whose drug use amounts to a youthful indiscretion into federal felons merely because they happen to use their cell phones. It would permanently destroy their futures and chances at rehabilitation, depriving them of some of the most important rights a citizen can have in our republican form of Government. Criminal disenfranchisement laws routinely deny those convicted of felonies the right to vote.[11] Conviction of a crime punishable by imprisonment for more than one year—including a violation of § 843(b)—also disqualifies citizens from serving on a federal jury indefinitely (absent a restoration of civil rights). See 28 U.S.C. § 1865(b)(5). And the "only method currently provided by federal law to restore civil rights is a pardon." Office of the Pardon Attorney, *Federal Statutes Imposing Collateral Consequences Upon Conviction* 1 (2000).

The impact on an individual's ability to earn a living and financial well-being is equally severe. For example, a convicted felon may not be able to serve this country by enlisting in the armed forces, 10 U.S.C. § 504(a), or be permitted to be a pilot or flight instructor, 14 C.F.R. § 61.15(c), (d). Although a felony conviction does not disqualify a person from federal employment, it "is a factor in determining suitability for it." Office of the Pardon

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[11] In 46 States and the District of Columbia, citizens who are incarcerated lose the right to vote. Jamie Fellner & Marc Mauer, Human Rights Watch and The Sentencing Project, *Losing the Vote, the Impact of Felony Disenfranchisement Laws in the United States*, Table 1 (1998), *avail. at* http://www.hrw.org/reports98/vote/usvot98o.htm. Felons on parole are disenfranchised in 32 States, while 29 States disenfranchise those on probation. *Ibid.* Another 14 States disenfranchise former felons even after their sentences are served, with ten States disenfranchising felons permanently. *Ibid.*

Attorney, *supra*, at 3. A felony conviction, moreover, may cost the convicted individual not merely his job but also his home and safety net. Those convicted of an offense punishable by more than one year of incarceration, such as § 843(b), may find their property forfeited under 21 U.S.C. § 881(a)(7). They can be evicted from public housing under 42 U.S.C. § 1437f(d)(1)(B)(iii). And they may lose federal benefits as well. Individuals with felony drug convictions are permanently barred from receiving food stamps and cash benefits funded under part A of Title IV of the Social Security Act. Robin Levi & Judith Appel, Office of Legal Affairs, *Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use* 4-5 (2003) (citing 21 U.S.C. § 862a). There is simply no evidence Congress intended to visit those harsh consequences on mere users, much less as a result of a single instance of youthful indiscretion in obtaining a personal-use quantity using a cell phone.

3. Such results are not merely harsh. They are also wholly at odds with Congress's many goals in distinguishing between users and traffickers. As an initial matter, Congress determined that traffickers are more dangerous and culpable than mere users. See pp. 14-15, *supra*. It is hard to see how the user's decision to use his cell phone could be thought to radically alter that calculus and make him into a felon with culpability approaching that of the dealer.

More fundamentally, Congress's focus for users was *rehabilitation*. See p. 15, *supra*. Treating initial personal-use purchasers as misdemeanants who can benefit from counseling and treatment is consistent with that goal. But converting the personal-use purchaser into a felon, simply because he uses a phone, is not. While treatment programs are often available in federal prisons, those convicted of a drug offense are more likely to receive treatment or participate in a substance-abuse

program while on probation or parole, rather than in prison or jail. Bureau of Justice Statistics, *Substance Dependence, Abuse, and Treatment of Jail Inmates* 8 (2002). Incarceration, moreover, often prolongs the road to recovery or simply exacerbates pre-existing addiction. As a result, many have come to the conclusion that "jail sanctions are not a recognized part of any medically accepted approach for the treatment of alcohol or drug addiction, or as a medically appropriate response to alcohol or drug relapse * * * ."[12]

Indeed, subjecting personal-use purchasers to incarceration on the same terms as traffickers would play havoc with Congress's rehabilitation efforts. Surrounding drug users in prison with hardened criminals and drug traffickers for a potentially extended period of time is simply counterproductive where the goal is reformation and reintegration into society.[13] Even apart from the impact of incarceration, branding someone a felon itself can interfere with rehabilitation. Increasingly, modern criminology has recognized that rehabilitation and reform can require the offender to create or renew a "prosocial" identity, a process called "desistance." Stephen

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[12] See Declaration of Peter Banys, M.C., M.Sc., in Support of Temporary Restraining Order and Preliminary Injunction at 3, ¶ 11, in *Gardner* v. *Schwarzenegger*, No. RG06278911 (Cal. Super. Ct. July 13, 2006). For that reason, many state governments are recognizing the negative impact of a jail sentence on drug rehabilitation. Since 2000, at least 17 States have rolled back mandatory minimum sentences and similar harsh penalties for nonviolent offenders, particularly individuals convicted of drug offenses. Scott Ehlers & Jason Ziedenberg, Justice Policy Institute, *Proposition 36: Five Years Later* 1 (2006).

[13] In the words of Anthony Burgess, "Cram criminals together and see what happens. You get concentrated criminality, crime in the midst of punishment." *A Clockwork Orange* 102 (W.W. Norton & Co. ed. 1986) (1962).

Farrall & Shadd Maruna, *Desistance-focused Criminal Justice Policy Research: Introduction to a Special Issue on Desistance from Crime and Public Policy*, 43 How. J. of Crim. Just. 358, 358-359 (2004). Permanently branding the offender a "felon"—and denying him the myriad rights described above, see pp. 19-20, *supra*—can have a devastating effect on that process: It can reinforce the offender's criminal identity and make it more difficult for him build a new, civic-minded one.[14] By choosing to treat drug users as misdemeanants, Congress maximized their chances at rehabilitation by shedding their identity as criminals. By permanently branding those same individuals as felons (for having supposedly "facilitated" their source's felony of selling drugs to them), the government's construction eviscerates Congress's efforts.

4. The Fourth Circuit's contrary view rested in part on its claim that users who make purchases using a communications facility deserve greater punishment because the facility "makes it easier for criminals to engage in skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement." Pet. App. 12a. That argument proves too much. If Congress's goal was to increase the penalty whenever someone uses a cell phone—because it putatively makes detection more difficult or because Congress sought to protect communications networks from misuse—there would have been no reason for Congress to limit § 843(b) to use of a communication facility in a "felony" drug offense; it

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[14] See Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* 165 (2001); John Laub & Robert Sampson, *Understanding Desistance from Crime*, 28 Crime and Justice: A Review of Research 1 (M. Tonry ed. 2000); Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 Soc. Psychol. Q. 284 (2000).

would have drafted the provision to address use of a communication facility to facilitate *any* drug offense (as was the case in the predecessor to § 843(b), see p. 13, *supra*). Nor is it sensible to suggest that using a communication facility makes detection more difficult. E-mail, text-messaging, and faxing not only leave an electronic or physical paper trail, but are capable of being intercepted by law enforcement. Indeed, it was a wiretap of the dealer's cell phone that was used to collect the evidence that eventually led to petitioner's conviction. Pet. App. 3a.

In any event, it is nonsense to suggest that Congress somehow had a preference for in-person transactions in open-air drug markets. Those markets often operate in a specific, geographically defined area at identifiable times so that buyers and sellers are able to locate one another with ease. See Alex Harocopos & Mike Hough, Community Oriented Policing Services, *Drug Dealing in Open-Air Markets* 1 (2005). Such street dealing has devastating societal impacts on people other than the purchaser and seller. Open-air drug markets blight inner-city neighborhoods, reducing economic, educational, and social opportunities available to law-abiding adults and children. Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 Conn. L. Rev. 571, 584 (1995). Street dealing increases violent crime, with dealers routinely battling for territory to sling their wares, endangering innocent bystanders and law enforcement personnel. *Ibid.*; see also *Cotton* v. *State of Maryland*, 872 A.2d 87, 92-93 (Md. 2005). And open-air drug markets have a disparate impact on those who occupy inner-city areas and neighborhoods. National Drug Intelligence Center, *Washington/Baltimore High Intensity Drug Trafficking Area Drug Market Analysis* 9 (2008). Whatever might be said about Congress's chosen policies for combating illegal drug use and distribution, favoring

street-dealing over electronic communications is not among them.

II. This Court Should Apply The Rule Of Lenity To Resolve Any Ambiguity Regarding The Scope Of Section 843(b)

To the extent that a "reasonable doubt" still persists about the scope of the statute, the rule of lenity should be applied. See *United States* v. *R.L.C.*, 503 U.S. 291, 305-06 (1992). The rule of lenity dictates that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoke in language that is clear and definite." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted). Application of the rule is particularly appropriate in the context of § 843(b), which has serious consequences for purchasers of personal-use quantities of drugs as well as the prerogative of the legislative branch to designate certain individuals as deserving of treatment rather than harsh punishments.

The government's position would convert treatable users into federal felons for making what are otherwise misdemeanor purchases merely because they happen to use a phone. It seems unlikely indeed that Congress intended to convert every youthful indiscretion in seeking to acquire drugs for experimentation into a felony just because the inquiry about drugs is texted rather than whispered—indeed, that it intended to deny those committing such indiscretions using a phone the right to vote, serve on juries, serve in the military, and deny them federal benefits in perpetuity. See pp. 19-20, *supra*. That seems particularly clear given the ubiquity of cell phones, text messaging, and other "communication facilities" in modern society. See pp. 16-18, *supra*. Here, Congress has not clearly stated that § 843(b) encompasses buyers of small quantities of drugs for personal

use. As a result, this Court should apply the rule of lenity before subjecting an entirely new class of individuals—purchasers of personal-use quantities of drugs—to the harsh consequences of felony conviction.

Moreover, application of the rule preserves the separation of powers between Congress, the executive branch, and the courts. The executive branch should not be allowed to use the guise of prosecutorial discretion to eradicate Congress's careful distinction between drug users on the one hand, and sellers and distributors on the other. It remains within the sound discretion of Congress to review the statute, and if it intends to include buyers of personal-use quantities within the scope of § 843(b), to make that intention clear through plain and unambiguous language. Indeed, the rule of lenity serves as an incentive to Congress to clarify its intent. Broad interpretations of criminal statutes such as § 843(b) are likely to stick, because there is simply no effective lobby for narrowing criminal statutes. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2194 (2002). A narrower interpretation, by contrast, is far more likely to be corrected if erroneous because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and more readily have the ear of the legislative branch. *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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January 2009